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No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA, and
AUTO CLUB INSURANCE ASSOCIATION,
PETITIONERS

v.

WILLIAM J. BULLOCK,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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QUESTIONS PRESENTED

Respondent Bullock claims that when he was hired by petitioner AAA in 1968, he was orally promised that he would be paid sales commissions and would be discharged only if caught stealing. In 1978 a union was certified by the NLRB as the exclusive bargaining representative of AAA's sales employees, including Bullock. AAA and the union collectively bargained to a bona fide impasse, whereupon AAA lawfully unilaterally implemented its final offer including a unit compensation system and minimum production standards. Bullock was later discharged under these minimum production standards. He sued in Michigan state court claiming breach of the alleged oral contract made when he was hired. The Michigan Supreme Court held that his state-law contract claims were not preempted by the National Labor Relations Act ("NLRA").

The questions presented are:

1. Whether the NLRA preempts, under the *Garmon* doctrine, an employee's state-law employment contract claims that are directly contrary to terms and conditions of employment lawfully implemented by the employer following an impasse in collective bargaining with the employee's exclusive bargaining representative, for the reason that the state-law claims concern conduct arguably subject to the Act.

2. Whether the NLRA preempts, under the *Machinists* doctrine, these state-law employment contract claims because they undermine an economic self-help remedy that Congress intended to be unregulated and controlled only by the free play of economic forces.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

All parties to the proceedings below subject to this petition are set forth in the caption.

The only parent company, subsidiary (other than wholly owned subsidiaries), or affiliate of the petitioners is Auto Club Leasing Company.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
1. Factual Background	3
2. Bullock's Lawsuit in State Court	6
3. The Michigan Court of Appeals' Opinion	8
4. The Michigan Supreme Court's Opinion	9
REASONS FOR GRANTING THE PETITION	11
I. The Michigan Supreme Court Has Decided An Important Federal Question In A Way That Cannot Be Reconciled With This Court's Decisions And Threatens To Disrupt Federal Labor Policy	14
A. Bullock's state-law claims are preempted under *Garmon* because they concern activity arguably subject to the NLRA	14
B. Bullock's state-law claims are preempted under *Machinists* because they undermine an economic self-help remedy that Congress intended to be unregulated and controlled only by the free play of economic forces	22
II. The Michigan Supreme Court's Decision Conflicts With Decisions Of Several Federal Courts Of Appeals.	26
CONCLUSION	30
APPENDICES	
A. Michigan Supreme Court Opinion	1a
B. Order Denying Rehearing	56a
C. "Editor's Note"	57a
D. Michigan Court of Appeals Opinion	58a
E. Wayne County Circuit Court Order	71a
F. Constitutional and Statutory Provisions Involved	73a

TABLE OF CONTENTS — (Continued)

		Page
G.	Complaint and Demand for Trial by Jury	75a
H.	First Amended Complaint and Demand for Trial by Jury	79a
I.	Second Amended Complaint and Demand for Trial by Jury	84a

TABLE OF AUTHORITIES

CASES:	Page
American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965)	19, 23
Automobile Club of Michigan, 237 NLRB 379 (1978), *enforced*, 631 F.2d 82 (6th Cir. 1980)	4
Automobile Club of Michigan, 267 NLRB 1206 (1983)	6, 19
Automobile Club of Michigan, Case Nos. 7-CA-15209, 7-CA-15400 (1979)	5
Bankey v. *Storer Broadcasting Co.*, 432 Mich. 438, 433 N.W.2d 112 (1989)	12
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	2, 10, 20, 24, 27, 29
Bi-Rite Foods, Inc., 147 NLRB 59 (1964)	19
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	13, 19
Construction Laborers v. *Curry*, 371 U.S. 542 (1963)	2
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 1975)	2
Derrico v. *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988)	28
Emhart Industries, 297 NLRB No. 29 (1989)	19
Emporium Capwell Co. v. *Community Org.*, 420 U.S. 50 (1975)	18, 20, 27
Farmer v. *Carpenters*, 430 U.S. 290 (1977)	21
Farrell v. *Automobile Club of Michigan*, 155 Mich. App. 378, 399 N.W.2d 531 (1986)	13
Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1 (1987)	22
Garner v. *Teamsters*, 346 U.S. 485 (1953)	15
Golden State Transit Corp. v. *Los Angeles*, 475 U.S. 608 (1986)	20, 23, 24, 25

TABLE OF AUTHORITIES — (Continued)

	Page
Guerincy v. *Automobile Club of Michigan*, Wayne County Circuit Court No. 84-402714-CZ	13
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970)	18
J.I. Case Co. v. *NLRB*, 321 U.S. 332 (1944)	10, 25, 26
Kortas and Keener v. *Automobile Club of Michigan*, Wayne County Circuit Court No. 83-334618-CZ	13
Laborers Health & Welfare Trust Fund v. *Advanced Lightweight Concrete Co.*, ____ U.S. ____, 108 S. Ct. 830 (1988)	18
LaPorte Transit Co., 286 NLRB No. 10 (1987), *enforced*, ____ F.2d ____ (7th Cir. Nov. 1, 1989)	19
Longshoremen v. *Davis*, 476 U.S. 380 (1985)	14
Machinists v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)	*passim*
Maushund v. *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986)	27
Medo Photo Supply Corp. v. *NLRB*, 321 U.S. 678 (1944)	20
Metropolitan Life Insurance Co. v. *Massachusetts*, 471 U.S. 724 (1985)	22, 23, 25
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971)	16, 20, 21, 29
National Metalcrafters, Division of Keystone Consolidated Industries v. *McNeil*, 784 F.2d 817 (7th Cir. 1986)	9, 26
NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)	17, 27
NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 (1960)	22

TABLE OF AUTHORITIES — (Continued)

Page

NLRB v. *Katz*, 369 U.S. 736 (1962) 19, 24

Operating Engineers v. *Jones*, 460 U.S. 669 (1983) 16, 17, 19, 21, 29

Pacific Intercom Co., 255 NLRB 28 (1981) 20

Parker v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989) 29

Powell v. *National Football League*, ____ F.2d ____, 132 LRRM 2866 (8th Cir. Nov. 1, 1989) 19

Roberts v. *Automobile Club of Michigan*, 138 Mich. App. 488, 360 N.W.2d 224 (1984), *leave to appeal denied*, 424 Mich. 867 (1986), *cert. denied*, 479 U.S. 889 (1986) 8

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) ..... *passim*

Sears, Roebuck & Co. v. *Carpenters*, 436 U.S. 180 (1978) 10, 17

Serrano v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) 9, 28

Skladzien v. *Automobile Club of Michigan*, Wayne County Circuit Court No. 84-420005-CK 13

Teamsters Union v. *Morton*, 377 U.S. 252 (1964) 22

Toussaint v. *Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) 9, 13, 27

Wells v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989) 29

Western Newspaper Publishing Co., 269 NLRB 355 (1984) 19

Wolff v. *Automobile Club of Michigan*, Wayne County Circuit Court No. 83-308498-CK 13

TABLE OF AUTHORITIES — (Continued)

Page

MISCELLANEOUS:

National Labor Relations Act, 29 U.S.C. §151 *et seq* ..... *passim*

Shepard, Heylman & Duston, *Without Just Cause* (BNA 1989) 13

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WILLIAM J. BULLOCK,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Automobile Club of Michigan, a/k/a AAA, and Auto Club Insurance Association petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App. A, *infra*, 1a-55a) is reported at 432 Mich. 472, 444 N.W.2d 114. The Michigan Supreme Court's order denying AAA's motion for rehearing (App. B, *infra*, 56a) is unreported. The Michigan Supreme Court's "Editor's Note" amending a portion of its opinion (App. C, *infra*, 57a) is unreported. The opinion of the Michigan Court of Appeals (App. D, *infra*, 58a-70a) is reported at 146 Mich. App. 711, 381 N.W.2d 793. The order of the Wayne County Circuit Court (App. E, *infra*, 71a-72a) is unreported.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on June 6, 1989, and AAA's petition for rehearing was denied on September 8, 1989 (App. B, *infra*, 56a). The jurisdiction of this Court is invoked under 28 U.S.C. §1257.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, set forth at App. F, *infra*, 73a-74a, are: Supremacy Clause, United States Constitution, Article VI, Clause 2; National Labor Relations Act, Sections 7, 8(a), 8(d), 9(a), and 10(a), 29 U.S.C. §§157, 158(a), 158(d), 159(a), 160(a).

STATEMENT

Respondent William J. Bullock is a former sales representative of petitioner Automobile Club of Michigan ("AAA") who was discharged from his job because he failed to satisfy minimum production standards AAA had lawfully implemented following a bona fide impasse in collective bargaining with Bullock's union. It is not disputed by Bullock that he failed to satisfy these production standards, or that they were imposed following a bargaining impasse. Instead, Bullock claims in this state court action that his employment with AAA was governed by an individual oral employment contract made when he was hired by AAA ten years before his union was certified. According to Bullock, his individ-

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[1] The judgment of the Michigan Supreme Court is "final" for purposes of 28 U.S.C. §1257, even though the Michigan Supreme Court remanded the case for trial, because it finally disposed of the federal preemption issue, reversal here would terminate the state claim, and to permit the state claim to go forward in state court without resolving the preemption issue "would involve a serious risk of eroding the federal statutory policy" of " 'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.' " *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-98 n. 5 (1983), quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975); *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963).

ual contract provided that he would be discharged only if caught stealing. Bullock contends that this alleged oral contract is enforceable by a state court jury despite the National Labor Relations Board's intervening certification of Bullock's union and despite AAA's lawful implementation of minimum production standards and disciplinary procedures following an impasse in collective bargaining with Bullock's union. Bullock also contends that his individual contract provided for radically different compensation terms than those implemented by AAA following the impasse in bargaining. Bullock thus seeks to have a state court jury enforce an alleged individual oral employment contract that is directly at odds with terms and conditions of employment produced by the collective bargaining process.

Because Bullock's state-law claims concern conduct that is arguably protected or prohibited by the National Labor Relations Act ("NLRA" or "Act"), and because his claims concern conduct that Congress intended be left unregulated for the combatants in labor disputes, it must be held preempted by the NLRA. Permitting Bullock's state-law claims to proceed would both intrude upon the jurisdiction of the National Labor Relations Board ("NLRB" or "Board") and contravene established federal labor policies governing economic self-help remedies. Indeed, Bullock's state-law claims — and similar claims being asserted in state courts by countless union-represented employees — would nullify crucial elements of the federal scheme of labor-management relations, creating uncertainty and unpredictability in this important field.

1. *Factual Background.* Respondent Bullock was hired by AAA in 1968, at a time when AAA's sales representatives were not represented by a union (App., *infra*, 20a). In his state court complaint filed after he was discharged in 1982, Bullock asserted (¶3) that the following "promises" were made when he "entered the employ" of AAA 14 years earlier (App., *infra*, 4a-5a):

> (a) That he would have a lifetime job as long as he did not steal;

(b) That he would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent commission for sales which had been in effect for many years;

(c) That if he worked hard and built up his "book of business," he would be able to earn large sums of money;

(d) That if he worked hard and built up his "book of business," he would enjoy his later working years with Defendant by realizing commissions from the "book of business," which "book of business" is the accumulated memberships and policies which a commission salesman builds up over the years.

Bullock further alleged in his complaint (¶4) that he thereafter "worked very hard and built up his 'book of business' in reliance upon the promises of Defendant and in order to enable him to enjoy the benefits of a large salary due to his individual efforts in developing his business" (App., *infra,* 5a).

On February 7, 1978, following an election conducted pursuant to §9 of the NLRA, the NLRB certified the Michigan AAA Sales Association as the exclusive collective bargaining representative for AAA's sales representatives in a Detroit-area bargaining unit (App., *infra,* 20a). AAA thereafter challenged the propriety of the NLRB's certification, contending that only a state-wide bargaining unit was appropriate. This challenge was ultimately rejected. See *Automobile Club of Michigan,* 237 NLRB 379 (1978), *enforced,* 631 F.2d 82 (6th Cir. 1980).

In the meantime, on July 1, 1978, after the union's certification but before the bargaining unit question was resolved, AAA eliminated commissions as the basis for compensating sales representatives, including Bullock, and instead established a "unit compensation" system. The union filed an unfair labor practice charge with the NLRB, asserting that this change in the compensation system constituted failure to bargain in good faith violative of §8(a)(1) and §8(a)(5) of the NLRA. After a hearing, an administrative law judge of the NLRB found that the company's

unilateral change in the compensation system did *not* "constitute the initiating of a new plan without consultation or discussion with the Union." *Automobile Club of Michigan,* Case Nos. 7-CA-15209, 7-CA-15400, ALJ Decision at 12 (1979).[2] The judge accordingly recommended "that the allegations of the complaint with regard thereto be dismissed." *Id.* The Board affirmed.

After the bargaining unit question was resolved in 1980, collective bargaining commenced between AAA and the union toward a first labor contract. However, despite numerous bargaining sessions, AAA and the union failed to reach agreement because the union firmly resisted a fundamental bargaining demand of the company: that the contract contain minimum production standards for sales representatives (App., *infra,* 20a). In 1981, after an extended period of bargaining, AAA presented to the union a final "last best" offer containing both its longstanding proposal for minimum production standards (*id.*) and a continuation of the unit compensation system that had been in effect since 1978. The minimum production standards included a disciplinary procedure whereby sales representatives who failed to meet prescribed production standards would receive, in progressive sequence, an oral warning, a written warning, probation, and ultimately discharge (App., *infra,* 21a).

On August 5, 1981, the company's final offer was rejected at a general meeting of the union's membership. It is undisputed that, at this juncture, AAA and the union were at a bona fide impasse in their collective bargaining (App., *infra,* 20a). Accordingly, AAA was free to unilaterally implement its final offer including the minimum production standards, disciplinary procedure, and unit compensation system. Effective September 1, 1981, AAA did so (*id.*). Though the union and its members could have gone on strike, they chose not to, and instead continued to work — but now under the terms of the company's final offer which had been implemented.

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[2] A copy of the unpublished ALJ Decision has been lodged with the Clerk of the Court.

Though negotiations continued, the union filed another unfair labor practice charge with the NLRB, asserting that AAA had unilaterally implemented new working conditions in reprisal for the sales representatives' support for the union in violation of §8(a)(1); the union did not assert a violation of the duty to bargain in good faith under §8(a)(5) and §8(d). After a hearing before an administrative law judge, this charge too was dismissed, and the Board affirmed. See *Automobile Club of Michigan,* 267 NLRB 1206 (1983).

Because Bullock failed to meet the minimum production standards contained in the implemented final offer under which he continued to work, he was progressively disciplined in accordance with the disciplinary procedure and was ultimately discharged in February 1982. There is no dispute that Bullock did fail to satisfy the standards and that the company did comply with its disciplinary procedure. Bullock was one of 75 sales representatives (out of a total of 570) discharged from their jobs over several months in accordance with the procedure because they failed to meet the production standards (App., *infra,* 18a n.7).

In October 1982, having failed to achieve a collective bargaining agreement with AAA, the union was decertified through another NLRB election (App., *infra,* 20a). It is undisputed that Bullock and his co-workers were discharged while the union was still certified as their exclusive bargaining representative.

2. *Bullock's Lawsuit in State Court.* In July 1982 Bullock filed a one-count complaint, with jury demand, in the Circuit Court for Wayne County, Michigan, asserting (¶5) that AAA had breached an express or implied contract with him by "changing its policies as follows" (App. G, *infra,* 76a-77a):

> (a) Eliminating commissions as a basis of compensation for sales persons;
>
> (b) Establishing a "unit compensation" program whereby the commission salesmen would only get a certain amount of money per membership or policy rather than a percentage commission as had been promised to the com-

mission salesmen when they entered the employ of Defendant;

(c) Establishing non-competitive rates for its product;

(d) Imposing unreasonable quotas upon the commission salesmen which, taken together with the non-competitive rates for Defendant's policies, made it impossible for the commission salesmen to achieve their quotas; and,

(e) Coercing Plaintiff and other persons similarly situated out of their employment thereby breaching the implied contract between Plaintiff and Defendant.

Bullock's state-law action thus asserted that his personal terms of employment were *directly contrary* to those implemented by AAA following the impasse in bargaining with Bullock's union.[3]

AAA moved in state court to dismiss Bullock's claims on NLRA preemption grounds.[4] After extensive briefing and argument, the trial court denied AAA's motion but certified the question for immediate appeal because it involved "controlling questions of law as to which there is substantial ground for

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[3] Most of the 75 sales representatives who had been discharged with Bullock for failing to meet the production standards filed virtually identical lawsuits in the Michigan Circuit Courts. Many of these suits were stayed pending a ruling on the NLRA preemption issue.

[4] AAA had removed Bullock's suit to U.S. District Court on NLRA preemption grounds. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). Anticipating this Court's later decision in *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 397-398 (1987), the U.S. District Court granted Bullock's motion to remand.

After his suit was remanded, Bullock filed a first amended complaint (App. H, *infra*, 79a-83a) in which he deleted his allegation in ¶5(d) that AAA had changed its policies by imposing quotas, though he left intact his discharge claim challenging the standard for termination; he also added claims for unjust enrichment, conversion, age discrimination, and negligent evaluation (App., *infra*, 18a-19a n.7, 24a n.17). A second amendment to the complaint (App. I, *infra*, 84a-90a) later reinstated an allegation in ¶7(c) regarding the imposition of quotas, added a claim for promissory estoppel, and dropped the claim for negligent evaluation.

difference of opinion" and immediate appeal "may materially advance the ultimate termination of the litigation" (App. E, *infra,* 71a-72a).

3. *The Michigan Court of Appeals' Opinion.* The intermediate appeals court summarily rejected the company's NLRA preemption arguments (App., *infra,* 69a-70a). In that court's view, the *Garmon* and *Machinists* preemption doctrines could not apply simply because no collective bargaining agreement had ever been consummated between AAA and the union. It was of no import that the terms of employment at issue had been unilaterally implemented following an impasse in collective bargaining with a union — an economic self-help weapon expressly sanctioned by federal law. As the court saw it, the parties had merely negotiated for a time and gone their separate ways (*id.* at 69a):

> Reduced to its basic meaning, collective bargaining is no more than negotiating. It only brings about contract rights, it does not consist of them. As in a one-on-one agreement where there is no meeting of the minds, collective bargaining which does not bear an agreement is no more than a process without a result. As such, bargaining to impasse on the formation of a new agreement creates nothing that could supersede preexisting contract rights.
>
> Since no collective bargaining agreement was ever reached in this case, [Bullock's] preexisting contract rights are still in effect. Redress for any alleged breach of those rights is properly brought in state courts.[5]

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[5] The appeals court also noted (*id.* at 70a) its agreement with the NLRA preemption analysis in that court's earlier decision in *Roberts* v. *Automobile Club of Michigan,* 138 Mich. App. 488, 360 N.W.2d 224 (1984), *leave to appeal denied,* 424 Mich. 867 (1986), *cert. denied,* 479 U.S. 889 (1986) (Justices Brennan and Marshall dissenting from the denial). The *Roberts* case was decided only by Michigan's intermediate appellate court, and predated all of the federal decisions, discussed *infra,* demonstrating a conflict between the Michigan court and numerous federal courts of appeals. The grounds justifying a grant of certiorari in *Bullock* have substantially changed since the denial of certiorari in *Roberts.*

4. *The Michigan Supreme Court's Opinion.* Michigan's highest court rejected the company's NLRA preemption arguments for essentially the same reason — the absence of a consummated contract between AAA and the union.[6] In the court's view, Bullock's state-law claims, which were predicated on alleged oral promises that pre-dated the company's unilateral implementation of unit compensation and minimum production standards, were "essentially an ordinary contract action, routinely heard in state court" because no collective agreement had ever been reached (App., *infra,* 27a-28a). The court noted that its far-reaching employment contract decision in *Toussaint* v. *Blue Cross & Blue Shield of Michigan,* 408 Mich. 579, 292 N.W.2d 880 (1980), "made no exception for unionized employees" (App., *infra,* 28a n.22).[7] The court rejected AAA's argument that its decision conflicted with *National Metalcrafters, Division of Keystone Consolidated Industries* v. *McNeil,* 784 F.2d 817 (7th Cir. 1986); and *Serrano* v. *Jones & Laughlin Steel Co.,* 790 F.2d 1279 (6th Cir. 1986), erroneously concluding that these cases involved only §301 preemption (App., *infra,* 21a-22a n.9).

With regard to *Garmon* preemption, the Michigan court concluded that "the substance of Bullock's state law claims significantly differ[s] from any claims he could have presented to the NLRB" because the NLRB is only "concerned with the process of bargaining" and would only "decide whether an impasse in bargaining had occurred"; accordingly, the court rea-

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[6] Justice Levin's separate opinion was the opinion of the court on the NLRA preemption question (App., *infra,* 14a-28a) and was joined by each of the other Michigan Supreme Court Justices (App., *infra,* 7a-8a, 39a).

[7] In finding Bullock's lawsuit "essentially an ordinary contract action," the Michigan Supreme Court's original opinion posited that Bullock's union "was decertified before Bullock was discharged" (App., *infra,* 28a). This was of course not true and may have influenced the court's reasoning. The court issued an "Editor's Note" amending this portion of the opinion (App., *infra,* 57a) at the time it denied AAA's motion for rehearing. No question is presented here whether the NLRA would preempt an employee's state-law contract claim based on pre-certification promises, where he is discharged after decertification. Bullock was unquestionably in the bargaining unit and exclusively represented by the union when he was discharged.

soned, "Bullock's state law claims could not have been presented to the NLRB" nor could the NLRB "have provided a remedy for his state law claims" (App., *infra*, 25a-26a). In the Michigan court's view, because Bullock could not have obtained relief from the NLRB *on his state-law claim* (i.e., the NLRB would have rejected it), to allow that claim to proceed in state court would "pose[] no risk of interference with the jurisdiction of the NLRB" (*id.*), citing *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), and *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978). The court thus focused *not* on whether the state-law claim concerned conduct governed by the NLRA, but on whether the NLRB would itself adjudicate and remediate the state-law claim.

The Michigan court also rejected the company's *Machinists* preemption argument that an employer's right to impose a final "last best" offer following an impasse in bargaining is an economic self-help remedy for labor disputants that is controlled only by the free play of economic forces and must remain free of state regulation (App., *infra*, 26a). The court disposed of *Machinists* preemption by citing a portion of *Belknap* v. *Hale*, *supra*, that addressed only *Garmon* preemption. The court then stated (App., *infra*, 27a):

> The selection of a union representative did not instantly extinguish Bullock's state law claims or contract rights. Employees would hesitate to cast their lot with a union if they were deemed to have forgiven their common-law contract and other claims when a collective bargaining agent was certified without regard to whether a collective bargaining agreement is entered into.

Relying on *dictum* in this Court's opinion in *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336-337 (1944), the Michigan court reasoned that because negotiations between AAA and the union had become deadlocked and no labor agreement had been consummated, enforcement of pre-existing state-law contract rights would not "frustrate any policy of the federal labor laws" (App., *infra*, 28a).

The Michigan Supreme Court accordingly rejected both *Garmon* and *Machinists* preemption and determined that the Michigan courts had jurisdiction of the subject matter of Bullock's state-law contract claims predicated on individual terms of employment directly contrary to the unilaterally implemented unit compensation system and production standards.

AAA moved for rehearing on the NLRA preemption question, pointing out that the court's decision clashed with numerous federal court of appeals decisions, misconstrued the role and jurisdiction of the NLRB, overlooked important decisions of this Court, and applied incorrect standards for both *Garmon* and *Machinists* preemption. The Michigan Supreme Court denied the motion without comment (App., *infra*, 57a).

REASONS FOR GRANTING THE PETITION

Since 1935 when the NLRA was enacted, this Court has repeatedly grappled with preemption issues relating to state-law actions that might intrude on the federal scheme of labor-management relations created and governed by the Act. In recent decades there have evolved in this Court's decisions two distinct doctrines of NLRA preemption. First, *Garmon* preemption precludes state-law claims that regulate conduct that is actually or arguably subject to §7 or §8 of the NLRA. *San Diego Building Trades Council* v. *Garmon*, 357 U.S. 236, 245 (1959). Second, *Machinists* preemption precludes state-law claims or regulation affecting the self-help remedies of labor disputants that Congress intended to be left unregulated and controlled only by the free play of economic forces. *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 147 (1976).

Bullock's state-law claims directly implicate both of these NLRA preemption doctrines. AAA's actions in unilaterally implementing new terms of employment following an impasse in bargaining fell squarely within the purview of the NLRA, and Bullock's claims could have been (and in some respects were) presented as unfair labor practice charges to the NLRB. To

permit Bullock to prosecute his state-law claims seeking to enforce terms of employment radically different than those collectively bargained with his union, would force AAA to commit an unfair labor practice by granting more favorable terms to individual employees and bypassing the collective bargaining process. *Garmon* preemption therefore applies. In addition, Bullock's state-law claims, if allowed to proceed, would effectively deprive his employer of its right under the NLRA to implement a final offer following an impasse in bargaining — a crucial self-help weapon — thereby altering the balance of economic forces. *Machinists* preemption also applies.

The Michigan Supreme Court's decision permits countless unionized employees to shield themselves from *lawful* unilateral changes in employment terms following an impasse by spurning the NLRA's structure for collective bargaining and the NLRB's jurisdiction over this field. AAA fully complied with the collective bargaining process established by the NLRB. But by allowing state courts to enforce terms of employment wholly inconsistent with those mandated by federal law, the Michigan court has effectively rewritten and nullified the federal scheme.[8] Any circumstance involving a hiatus in a collective bargaining agreement is vulnerable to such state-law challenges. Nor can an employer know what contrary terms will be asserted by employees for adjudication by a local jury. Congress did not intend that state court juries would, in such situations, determine the terms and conditions of employment for union-represented employees. Predictability and uniformity in labor relations — the cornerstones of federal labor law and policy — are thus eroded and employers

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[8] In *Bankey* v. *Storer Broadcasting Co.*, 432 Mich. 438, 433 N.W.2d 112 (1989), a companion case to *Bullock*, the Michigan Supreme Court addressed an employer's ability (through reasonable notice uniformly given to affected employees) to unilaterally alter contractual terms of employment for *non-union* employees. The court in *Bullock* extended these state-law principles to *unionized* employees, as the court expressly acknowledged (*App., infra,* 28a n.22). By thus applying state-law contract principles to unionized employees governed by federal law, the Michigan court nullified the federal scheme for unilaterally altering terms of employment following an impasse in collective bargaining with an employee's union.

(allegedly subject to both federal and state employment laws) are left in a conundrum of irreconcilable obligations.[9]

The NLRA preemption issues presented in this case are recurring ones. They were identified, but not decided, by this Court in *Caterpillar Inc.* v. *Williams,* 482 U.S. 386, 397-398 (1987). The Court there noted that, while *Garmon* and *Machinists* preemption defenses under the NLRA would not create removal jurisdiction, individual employment contract claims brought by union-represented employees in state court "might be pre-empted by the NLRA." *Id.* at 398 n.12. As state-law individual contract suits by union-represented employees like Bullock proliferate, guidance is needed from this Court for employers and employees to determine the extent to which such claims are precluded by the NLRA, and to resolve the recurring and concrete dilemma created by the decision below.[10]

Finally, the decision below is not only out of step with this Court's *Garmon* and *Machinists* decisions and their progeny, but it is in direct conflict with decisions by the Second, Sixth, Seventh, and Eleventh Circuits. The Fifth Circuit has deepened the conflict by rejecting NLRA preemption in a related circumstance. These conflicts have created uncertainty in a field that

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[9] Of the scores of virtually identical lawsuits brought by Bullock and his coworkers in Michigan state courts, five have been tried. In *Guerincy* v. *Automobile Club of Michigan,* Wayne County Circuit Court No. 84-402714-CZ, the employee's claim was tried to the court rather than a jury, and the judge entered a "no cause" judgment in AAA's favor. Four cases tried to state court juries have produced verdicts: *Skladzien* v. *Automobile Club of Michigan,* Wayne County Circuit Court No. 84-420005-CK ($1,100,587); *Wolff* v. *Automobile Club of Michigan,* Wayne County Circuit Court No. 83-308498-CK ($300,000, remitted to $220,000); *Kortas and Keener* v. *Automobile Club of Michigan,* Wayne County Circuit Court No. 83-334618-CZ ($622,254 and $592,302 respectively); *Farrell* v. *Automobile Club of Michigan,* 155 Mich. App. 378, 399 N.W.2d 531 ($150,000).

[10] While the Michigan Supreme Court's 1980 decision in *Toussaint* v. *Blue Cross & Blue Shield of Michigan, supra,* was one of the earliest and most sweeping, court decisions in at least 36 States have now recognized express and implied contract exceptions to the employment-at-will doctrine. Shepard, Heylman & Duston, *Without Just Cause* 8-9 (BNA 1989).

should bear predictability and national uniformity. Review by this Court is plainly warranted. Inasmuch as the claims at issue clearly implicate federal labor policy under the NLRA and the jurisdiction of the NLRB, were there to be any doubt the Court may wish to request the views of the Solicitor General.

I. The Michigan Supreme Court Has Decided An Important Federal Question In A Way That Cannot Be Reconciled With This Court's Decisions And Threatens To Disrupt Federal Labor Policy.

A. Bullock's state-law claims are preempted under Garmon *because they concern activity arguably subject to the NLRA.*

There is no dispute in this case that (1) AAA bargained to impasse with Bullock's union and thereafter lawfully implemented its final offer including the minimum production standards and unit compensation system; (2) Bullock (and his coworkers) thereafter continued to work under the new terms and was disciplined and discharged in accordance with the production standards and disciplinary procedure; (3) Bullock's union filed charges with the NLRB challenging certain of AAA's actions, and the NLRB dismissed each of the union's charges; and (4) Bullock's state court lawsuit seeks to have a jury adjudicate terms of an alleged individual oral employment contract that are *directly contrary* to those implemented following the impasse in bargaining.

In these circumstances, the *Garmon* preemption doctrine mandates that federal labor law and policy supersede Bullock's state cause of action. The decision below cannot be reconciled with the rulings of this Court or the principles of federal labor policy reflected in those rulings.

As this Court most recently stated in *Longshoremen* v. *Davis*, 476 U.S. 380 (1985):

> Subject to exception only in limited circumstances, "[w]hen an activity is arguably subject to §7 or §8 of the Act * * *,

> the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Id. at 381, quoting *Garmon, supra,* 359 U.S. at 245. Citing its early opinion in *Garner* v. *Teamsters*, 346 U.S. 485, 490-491 (1953), the Court in *Longshoremen* repeated "what has come to be the accepted basis for the broadly pre-emptive scope of the NLRA" (476 U.S. at 389):

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain *uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.* . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." (Emphasis added.)

The Court in *Longshoremen* went on to emphasize the "now well-established scope of [*Garmon*] pre-emption" (*id.*): that in light of the statute's "complex and interrelated federal scheme of law, remedy, and administration," *Garmon*, 359 U.S. at 243, "due regard for the federal enactment requires that state jurisdiction must yield" (*id.* at 244) in circumstances where "the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of §7 or §8." Even in ambiguous situations, this Court admonished, "courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first

instance to the National Labor Relations Board." 476 U.S. at 389-390, quoting *Garmon*, 359 U.S. at 244-245. The force of NLRA preemption is so powerful that, "[i]f there is pre-emption under *Garmon*, then state jurisdiction is extinguished." 476 U.S. at 391 (footnote omitted).

The *Garmon* preemption doctrine has frequently been invoked to bar common law claims, however styled, brought by employees in state courts. For example, in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), a union member brought a state court contract action against his union after being discharged pursuant to a union security clause in a labor contract. This Court held that Lockridge's state-law claim involved conduct within the purview of §7 and §8 of the Act, and explicitly rejected the reasoning of the Idaho Supreme Court — identical to the Michigan Supreme Court's reasoning here — that the theory or label of the state lawsuit made a difference:

> Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Pre-emption * * * is designed to shield the system from conflicting regulation of conduct. *It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.* *Id.* at 292 (emphasis added).

More recently the Court held in *Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), that a state-law claim of interference with an employment contract brought by an employee/union member was preempted under *Garmon* because, once again, it involved conduct arguably protected or prohibited by the Act. This was so even though the state-law claim was not identical to that which could have been presented to the NLRB. The Court rejected Jones' "identicality of controversies" argument — which was fully relied on by the court below — for two reasons that apply here. First, adjudicating the employee's state-law claim would require the state court to decide federal labor law issues in the first instance, issues which "should be resolved by the Board";

second, the claims overlapped on a "crucial element" of federal law rendering "the federal and state claims * * * the same in a fundamental respect." 460 U.S. at 682. As a result, "[t]he risk of interference with the Board's jurisdiction [was] obvious and substantial." *Id.* at 683.[11]

Contrary to these decisions of this Court, the Michigan Supreme Court characterized Bullock's lawsuit as "essentially an ordinary contract action, routinely heard in state court" (App., *infra,* 27a). The Michigan court not only applied the notion of "identicality" in an improper and mechanistic way, see *Operating Engineers* v. *Jones, supra;* it disregarded the "arguably protected" branch of *Garmon* preemption; and it wholly failed to understand the scope of §7 and §8 of the NLRA and the role and jurisdiction of the NLRB. Most fundamentally, the court ignored the fact that, under §9(a) of the Act, once Bullock and his co-workers voted for union representation, the union became "the exclusive representative[ ] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *." As this Court stated in *NLRB* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 180 (1967):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor

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[11] Compare *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 197 (1978), upon which the Michigan Supreme Court rested its decision. *Sears* involved an employer's trespass action against union picketing where the union declined to file an unfair labor practice charge with the NLRB, and the employer was unable to do so. The Court stated that the "critical inquiry" for the "arguably prohibited" branch of *Garmon* preemption is whether "the controversy presented to the state court is identical to * * * or different from * * * that which could have been, but was not, presented to the Labor Board." 436 U.S. at 197. The state court issue in *Sears* was the location of the picketing whereas the NLRA issues were "completely unrelated to the simple question whether a trespass had occurred." *Id.* at 198. The Court in *Operating Engineers* v. *Jones, supra,* appears to have eased the "identicality of controversies" standard in the context of an employee claim more closely resembling that here. In any event, this "identicality" standard is not applicable to the "arguably protected" branch of *Garmon* preemption, upon which AAA also relies.

> organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. *The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.* * * * *Thus only the union may contract the employee's terms and conditions of employment* * * *. The employee may disagree with many of the union decisions but is bound by them. (Emphasis added.)

See also *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 62-64 (1975) (separate bargaining by individual employees is antithetical to the Act's principle of exclusive representation and is therefore unprotected).

The core of Bullock's state-law claims (and those of his 75 discharged co-workers) is that AAA wrongfully applied to him the unit compensation system and minimum production standards implemented following the impasse in collective bargaining with Bullock's union — inasmuch as he had allegedly been orally promised 14 years earlier that he would be paid on a commission basis and discharged only if caught stealing. Bullock thus contends that he had *an individual oral employment contract providing totally different terms* than those flowing from the collective bargaining process. Bullock's state-law claims could surely have been presented to the NLRB as an unlawful unilateral change by AAA that was "arguably prohibited" by §8(a)(5) and §8(d) of the NLRA, though the NLRB would likely have rejected his claims (as the Michigan court surmised) on the ground that AAA's action was in fact sanctioned or "protected" by the Act. This is so because the right of an employer to implement a final offer following an impasse in collective bargaining with a union, and thereby lawfully alter prior terms of employment for unit employees, is established beyond any question. See, e.g., *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, ____ U.S. ____, 108 S. Ct. 830, 833 n.5 (1988); *H.K. Porter*

Co. v. *NLRB*, 397 U.S. 99, 108-109 (1970); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 316 (1965); *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962); *Powell* v. *National Football League*, ____ F.2d ____, 132 LRRM 2866, 2872 (8th Cir. Nov. 1, 1989); *Western Newspaper Publishing Co.*, 269 NLRB 335 (1984); *Bi-Rite Foods, Inc.*, 147 NLRB 59 (1964). Having exercised that right, it would be plainly violative of §8(a)(5) and §8(d) for an employer to apply to Bullock any terms other than those contained in the unilaterally implemented final offer. See *Emhart Industries*, 297 NLRB No. 29 (1989). If AAA could not have voluntarily acceded to Bullock's claim under federal law, *a fortiori* AAA cannot be compelled to do so by Bullock's state court action.

Bullock and his union were free to file an unfair labor practice charge with the NLRB contesting AAA's unilateral implementation of the terms of its final offer; if a violation were found, the NLRB would be empowered to order re-establishment of the prior terms (the very relief Bullock seeks in his suit). *LaPorte Transit Co.*, 286 NLRB No. 10 (19), *enforced*, ____ F.2d ____ (7th Cir. Nov. 1, 1989). Indeed, the union did file an NLRB charge here, though it charged AAA only with reprisals under §8(a)(1) and not a failure to bargain in good faith under §8(a)(5) or §8(d). The NLRB dismissed the charge for lack of merit. See *Automobile Club of Michigan*, 267 NLRB 1206 (1983). AAA's action was thus presumptively "protected" by the NLRA. But, even if it were not, it would have been "arguably prohibited" and still subject to *Garmon* preemption. See *Operating Engineers* v. *Jones*, *supra*, 460 U.S. at 681-684.

The Board's jurisdiction is implicated on a second ground. Bullock's state-law claim posits that his employer had individually contracted with him for terms of employment directly contrary to those produced by collective bargaining with Bullock's exclusive representative under §9(a) of the Act. As the Court noted in *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398 n.12 (1987), "it is an unfair labor practice 'for the employer to disregard the bargaining representative by negotiating with individual employees,

whether a majority or a minority, with respect to wages, hours, and working conditions,' " quoting *Medo Photo Supply Corp.* v. *NLRB,* 321 U.S. 678, 684 (1944). The *Medo* decision affirmed "the essential principle" under the Act that "[b]argaining carried on by the employer directly with the employees * * * who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained * * *." *Id.* See also *Emporium Capwell Co., supra; Pacific Intercom Co.,* 255 NLRB 28 (1981) (individual agreements with employees establishing wage rate different than collectively bargained rate "bypassed" union and violated §8(a)(5)).

In short, Bullock's state-law claims ineluctably concern conduct arguably protected or prohibited by the Act. Indeed, his claims seek to achieve a result that would be violative of the Act. He was at all relevant times exclusively represented by the union which bargained on his behalf. He had access to the Board's remedies.[12] AAA's unilateral implementation of new employment terms was protected, or it could have been challenged as prohibited. While the Michigan court was likely correct that the NLRB would have rejected Bullock's claims as meritless, and therefore "would not have provided a remedy for his state-law claims" (App., *infra,* 25a-26a), this Court has consistently rejected such a test for *Garmon* preemption. See, e.g., *Motor Coach Employees* v. *Lockridge, supra,* 403 U.S. at 292. Indeed, the test for *Garmon* preemption utilized by the Michigan court — whether an NLRB charge is "identical" and would "provide[ ] a remedy for his state-law claims" — would render *Garmon* preemption inapplicable in virtually every case, despite this Court's repeated pronouncements to the contrary. The proper test is *whether the state-law claim*

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[12] Bullock was clearly not an "innocent third party" outside the bargaining relationship and without a Board remedy, as were the non-union strike replacements in *Belknap, Inc.* v. *Hale,* 463 U.S. 491, 510-511 (1983) — a case inappropriately relied upon by the Michigan court below. See also *Golden State Transit Corp.* v. *Los Angeles,* 475 U.S. 608, 617 n.7 (1986).

seeks to regulate conduct within the purview of the Act. That test is plainly satisfied.

The decision below foments all of the evils *Garmon* preemption was designed to avoid. It not only causes a "potential conflict of rules of law, of remedy, and of administration," 359 U.S. at 242, but it produces a direct confrontation between the federal scheme of labor relations and collective bargaining (which permits AAA's labor practices here) and a state-law contract theory (which purports to condemn those practices as violative of alleged oral "promises"). It is the Board's function to review the propriety of collective bargaining practices. "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* at 244. As the Court stated in *Farmer* v. *Carpenters*, 430 U.S. 290, 300 n.9 (1977), "Board approval of various * * * practices would be meaningless if state courts could declare those procedures violative of [a plaintiff's] contractual rights * * *." For the Act's objectives of uniformity and predictability in labor-management relations to be achieved, administration of matters governed by the Act must be left to the Board because to do otherwise "would create potential frustration of national purposes." *Garmon*, 359 U.S. at 244-245. This is especially so where state-law claims like Bullock's are triable to local juries which have no competence in the "complex and interrelated federal scheme of law, remedy, and administration" under the NLRA. *Id.* at 243.

Bullock's state-law contract claims should accordingly be held preempted under the *Garmon* doctrine.[13]

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[13] The Court recognized in *Garmon*, 359 U.S. at 243-244, that states retain the power to regulate "where the activity regulated was a merely peripheral concern" of the Act or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act" (footnote omitted). The Michigan Supreme Court did not rest its holding of non-preemption on either of these exceptions, nor would either apply. Compare *Motor Coach Employees* v. *Lockridge*, *supra*; *Operating Engi-*

B. Bullock's state-law claims are preempted under Machinists *because they undermine an economic self-help remedy that Congress intended to be unregulated and controlled only by the free play of economic forces.*

A second branch of NLRA preemption, often called *Machinists* preemption, was developed in *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), and *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). This branch precludes state efforts to regulate conduct that, while neither arguably protected nor prohibited by the Act, nevertheless implicates the federal scheme of labor relations embodied in the Act. It "protects against state interference with policies implicated by the structure of the Act, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985). See also *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19-20 (1987). In essence, *Machinists* preemption inquires whether "'Congress occupied this field and closed it to state regulation.'" *Machinists*, 427 U.S. at 146, quoting *Morton*, 377 U.S. at 258.

Central to *Machinists* preemption is the principle that "[i]n selecting which forms of economic pressure should be prohibited . . . , Congress struck the 'balance . . . between the uncontrolled power of management and labor to further their respective interests.' " *Id.* In establishing this balance of conflicting interests, Congress left unregulated certain self-help weapons that were to be controlled solely by "the free play of economic forces." *Machinists*, 427 U.S. at 146-147. Moreover, for a state to regulate self-help weapons intended to be left for the " 'free play of contending economic forces, . . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.' " *Id.* at 150 (citation omitted). In *NLRB* v.

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neers v. *Jones*, *supra*. Indeed, the statutory interests involved in this case go straight to the heart of the Act.

Insurance Agents' International Union, 361 U.S. 477, 489 (1960), the Court stated:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. * * * [T]he two factors — necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other incline to agree on one's terms — exist side by side.

In defining federal labor policy under the NLRA, "Congress determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated." *Metropolitan Life Insurance Co., supra,* 471 U.S. at 751. The balance thus struck prohibits a state from depriving a party to a labor dispute of an economic self-help weapon Congress granted to it.

Recently, in *Golden State Transit Corp.* v. *Los Angeles,* 475 U.S. 608 (1986) — a critical case not addressed by the court below — this Court applied *Machinists* preemption principles in holding that the City of Los Angeles had impermissibly "thwarted" the collective bargaining process by imposing a condition (that the employer resolve a labor dispute by a specified date) on the granting of a taxi franchise renewal. *Id.* at 615. By imposing this condition, the City had improperly denied the employer "the exercise of economic self-help" which the employer was "entirely justified in using * * * to withstand the strike in an attempt to obtain bargaining concessions from the union." *Id.*

The economic right of an employer under the NLRA unilaterally to implement a final offer following an impasse in collective bargaining with a union has long been recognized by this Court and the NLRB. See pages 18-19, *supra.* The ability to "institute unilaterally [new] working conditions" is an important employer "economic weapon" necessary "to counterbalance the employees' power of strike." *American Ship Building Co.* v.

NLRB, 380 U.S. 300, 316 (1965). It is undisputed that AAA exercised this federally protected weapon when, following an impasse in bargaining with Bullock's union, it implemented the terms of its final offer. Once implemented, these terms became the established and binding terms for bargaining unit employees, including Bullock, until altered through further bargaining or following another impasse. *NLRB v. Katz, supra.*

By permitting bargaining unit employees to maintain state court actions grounded on *individual* employment contracts containing contrary terms, the Michigan court has emasculated an employer's ability to utilize this weapon in the first instance. As in *Golden State Transit*, 475 U.S. at 615, allowing such claims "thwart[s] * * * the exercise of economic self-help." The mere threat of expensive and time-consuming state lawsuits challenging the terms under which each individual employee works following unilateral implementation of a final offer would so chill an employer's ability to utilize this weapon that it would exercise it only at its peril. The present situation aptly illustrates this peril: Eight years after unilaterally altering terms following the impasse in bargaining, AAA continues to defend scores of state court lawsuits in which local juries will, under the decision below, determine for each individual plaintiff whether AAA effectively implemented new terms of employment on September 1, 1981. Under the Michigan court's holding, state court juries will be the after-the-fact regulators of an employer's exercise of a federally sanctioned economic self-help right. That is the Board's responsibility. Juries will have the power to nullify that right altogether by imposing contrary terms of employment allegedly arising from oral promises. That flies in the face of the *Machinists* doctrine.

The Michigan court simplistically reasoned that "Bullock's action is essentially an ordinary contract action, routinely heard in state court" (App., *infra*, 27a). The court added that its holding in "*Toussaint* made no exception for unionized employees" (App., *infra*, 28a n.22). The court then purported to balance federal and state interests, improperly utilizing a portion of this Court's *Belknap* opinion that addressed only *Garmon* preemption.

Machinists preemption entails no such balancing of state and federal interests. *Metropolitan Life Insurance Co., supra,* 471 U.S. at 749 n.27; see also *Golden State Transit, supra,* 475 U.S. at 618 n.8. The Michigan court's holding was not just mistaken. It threatens to disrupt federal labor law and policy governing economic self-help weapons.

In concluding that Bullock's (and his co-workers') individual state-law contract claims would not be extinguished until a collective bargaining agreement was actually consummated (which never occurred as the union was later decertified), the Michigan court relied on *dictum* contained in this Court's opinion in *J.I. Case Co.* v. *NLRB,* 321 U.S. 332, 336-337 (1944) (App., *infra,* 27a-28).[14] The actual holding in *J.I. Case* concerned an

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[14] This Court stated in *dictum* in *J.I. Case*:

> Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out the terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: *Men may continue work after a collective agreement expires and, despite negotiation in good faith, the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.* 321 U.S. at 336-337 (emphasis added).

The Michigan court failed to note, however, that this *dictum* concluded with the following statement by this Court:

> As the employer *in these circumstances may be under no legal obligation to bargain collectively*, he may be free to enter into individual contracts. *Id.* at 337 (footnote omitted) (emphasis added).

While it may have been less clear in 1944 under the original version of the NLRA (which did not include §8(d)'s definition of the duty to bargain in in good faith) whether an employer would legally "be free to enter into individual contracts" in those circumstances, it certainly has been clear since the Taft-Hartley Act's addition of §8(d) in 1947 that an employer *would* violate §8(a)(5) by bargaining individually with employees in such circumstances. See cases cited at pages 19-20, *supra.* As the reference to "a completely individually bargained contract setting out the terms of employment" also suggests, the Court in *J.I. Case* did not have in mind the type of contractual oral "promises" alleged here which have been made enforceable by state courts only in the last decade. See note 10, *supra.*

entirely different issue than the enforceability of individual contracts by union-represented employees:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. 321 U.S. at 337.

Thus, *J.I Case's* holding actually supports an opposite proposition than that for which the court below cited it.

In relying on *dictum*, the Michigan court not only discarded the holding of that case, but contravened fundamental federal labor principles by generating wholesale state regulation of the collective bargaining process. Under the Michigan court's decision, most employers' pre-agreement bargaining options would be foreclosed because exercising them could produce a multiplicity of state-law claims by individual employees. This certainly was not the result contemplated by Congress nor intended by *J.I. Case*.

II. The Michigan Supreme Court's Decision Conflicts With Decisions Of Several Federal Courts Of Appeals.

A conflict exists on the NLRA preemption issue between the Michigan Supreme Court's decision below and decisions of the Second, Sixth, Seventh, and Eleventh Circuits. The Michigan court either disregarded these decisions, or mischaracterized "AAA's reliance" on them as "misplaced" because they only "involve §301 preemption" (App., *infra*, 21a-22a n.9). Each of the following decisions holds that state-law claims arising in comparable factual contexts are preempted under *Garmon* or *Machinists*.

In a case virtually identical to the instant case, *National Metalcrafters, Division of Keystone Consolidated Industries* v.

McNeil, 784 F.2d 817 (7th Cir. 1986), an employee and a state official claimed that the company had violated an Illinois wage payment statute by making vacation payments under a formula unilaterally implemented following an impasse in bargaining with the union — rather than under the pre-impasse formula. *Id.* at 823. In a carefully reasoned opinion by Judge Posner, the Seventh Circuit held the plaintiffs' state-law claims preempted under *Garmon. Id.* at 826-828. After thoroughly analyzing §8 of the NLRA, the court concluded that the company's right unilaterally to implement its final offer following impasse was "protected" by the Act, and that if the company had failed to bargain in good faith to impasse, its conduct would have been "prohibited" by the NLRA. In either event the plaintiffs' state-law claim was preempted. *Id.* at 827. In essence, the state-law claim simply created a new and conflicting layer of remedies for matters governed by the NLRA. *Id.* at 828. Thus, *National Metalcrafters* is directly inconsistent with the Michigan court's holding here.

In *Maushund* v. *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986), a bargaining unit employee who had not yet achieved seniority coverage under the collective bargaining agreement (by virtue of his "casual" status) alleged a "cause for discharge" individual employment contract under *Toussaint* v. *Blue Cross & Blue Shield of Michigan,* 408 Mich. 579, 292 N.W.2d 880 (1980) — precisely the same theory Bullock advances here. The Sixth Circuit held Maushund's state law claim preempted by the NLRA:

> [I]t is beyond question that Maushund must look to federal labor law for any relief and that his sole remedy, if any, lies not in state law but in the terms of the collective bargaining agreement. *NLRB* v. *Allis-Chalmers Mfg.* * * *. The collective bargaining process prohibits Maushund from engaging in separate negotiations with the company and precludes any actions to enforce such an agreement. See *Emporium Capwell* v. *Western Add. Comm. Org.* * * *. Maushund's reliance upon *Belknap* v. *Hale* * * * is misplaced. While *Belknap* held that an employer's obligations under a collective bargaining

> agreement did not insulate it from a state's "normal rules of law" governing its relationships with third parties, Maushund here clearly was not such a third party. 795 F.2d at 590-591.

This holding too is in direct conflict with that of the Michigan court.

The Second Circuit's decision in *Derrico* v. *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988), is also in direct conflict. A bargaining unit employee was discharged during the hiatus between an expired collective bargaining agreement and a newly bargained one. He predicated a state-law wrongful discharge claim on an alleged implied "cause for discharge" contract — the same type of claim asserted by Bullock here. The Second Circuit found this claim "inconsistent with the NLRA's structure" and therefore preempted under *Machinists*. *Id.* at 29. First, the court concluded that permitting the claim would artificially limit the bargaining parties' "economic weapons" which are "an integral part of the balance the NLRA strikes between labor and management." *Id.* The court held:

> Exposure to liability at state law for breach of contract under the circumstances of this case would significantly alter the labor-management relationship * * *. *Id.*

Second, the employee's state-law theory "would significantly affect the collective bargaining process that lies at the heart of the NLRA." *Id.* "The potential for disrupting collective bargaining," the court reasoned, "is thus especially serious in this case and compels the conclusion that the state-law claim is preempted by the NLRA." *Id.*

The approach to this NLRA preemption issue in *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986), is also in conflict with that of the Michigan court below. A group of unionized employees alleged that their employer had committed state-law fraud, misrepresentation, and breach of contractual duties by making express or implied promises to employees regarding its decision to keep a plant open. The employees' union had collectively bargained a concession agreement in anticipation

of the plant staying open. The court held that the employees' state-law claims arising from their termination were preempted by the NLRA under *Garmon, Motor Coach Employees* v. *Lockridge*, and *Operating Engineers* v. *Jones*. The gravamen of their state-law theories "implicated" the duty to bargain under §8(a)(5) and §8(d) of the NLRA, and the alleged conduct would arguably have involved a violation of §8. Moreover, "[f]ailure of an employer to bargain in good faith about terms and conditions of employment is not peripheral to the concerns of federal labor law; rather, it strikes at the heart of one of the basic concerns of that law." *Id.* at 1287. The Sixth Circuit also distinguished *Belknap* v. *Hale* as involving *two separate groups* of employees who had *entirely different controversies* with their employer: (1) union-represented strikers who were engaged in collective bargaining governed strictly by the NLRA; and (2) non-union replacements — "innocent third parties" — who were not involved in the collective bargaining process and whose remedies rested solely on state law. *Id.* at 1287-1288.

Finally, in *Parker* v. *Connors Steel Co.*, 855 F.2d 1510, 1515-1518 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989), the Eleventh Circuit adopted the Sixth Circuit's reasoning in *Serrano* in holding that virtually identical state-law claims were pre-empted by the NLRA.[15]

These conflicts in the application of the NLRA preemption doctrines create uncertainty in a field that, by virtue of the preemptive force of the NLRA, should bear predictability and national uniformity. AAA urges the Court to resolve the conflict, clarify whether the NLRA preempts union-represented employees' state-law individual contract claims in the circumstances presented here, and bring certainty to this important area affecting labor-management relations.

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[15] The Fifth Circuit in *Wells* v. *General Motors Corp.*, 881 F.2d 166, 169-172 (5th Cir. 1989), rejected the company's argument that employees' state-law claims, arising in circumstances not unlike those in *Serrano* and *Parker*, were preempted by the NLRA. *Wells* thus demonstrates conflict within the Circuits on this NLRA preemption issue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

MICHIGAN SUPREME COURT

BULLOCK v AUTOMOBILE CLUB OF MICHIGAN

Docket No. 78027. Argued March 5, 1987 (Calendar No. 19). Decided June 6, 1989.

William J. Bullock brought an action in the Wayne Circuit Court against the Automobile Club of Michigan, challenging his termination as a commission sales representative after fourteen years with AAA and changes in his compensation. The plaintiff asserted an oral contract of employment on the basis of statements made to him when he entered AAA's employ, and claimed that the contract was breached by AAA when it changed its method of compensating commission sales representatives, adopted new production standards and disciplinary procedures, and subsequently terminated him as a sales representative for failing to meet the new standards. The court, Michael L. Stacey, J., denied AAA's motion for accelerated or summary judgment, finding that the plaintiff had stated claims on which relief could be granted and that his claims were not preëmpted by federal law. The Court of Appeals, HOOD, P.J., and BRONSON and R. L. TAHVONEN, JJ., affirmed in an opinion per curiam (Docket No. 71773). AAA appeals.

In an opinion by Justice BOYLE, joined by Justices BRICKLEY, CAVANAGH, and ARCHER, the Supreme Court *held*:

The plaintiff's claim is not preëmpted by the National Labor Relations Act. On the basis of the record, the defendant is not entitled to judgment as a matter of law.

The plaintiff pled an action for breach of a verbal contract of employment alleged to have arisen at the commencement of his employment. To the extent that plaintiff relies on policy manuals as the basis for his claim, *In re Certified Question*, 432 Mich 438 (1989), provides the guidelines for resolution on remand as to whether unilateral change in the policy manuals would be effective. However, defendant's assertion of a change in policy manuals does not, on this record, establish that there is no genuine issue of material fact as to whether the plaintiff had an enforceable contract containing a limitation on discharge.

Justice LEVIN, writing separately, stated:

The plaintiff's state law claims are not preëmpted by the National Labor Relations Act. The denial of the defendant's

motion for summary judgment was proper, the plaintiff having sufficiently stated a claim upon which relief can be granted, and the defendant having failed to demonstrate that it is entitled to judgment as a matter of law. The central question whether provisions of the sales rules manual concerning minimum production standards were in fact terms of an employment contract is one of fact; it cannot be decided on a motion for summary disposition, but must be decided by the trier of fact following a trial at which employer and employee witnesses testify.

Affirmed and remanded for further proceedings.

Justice GRIFFIN, joined by Chief Justice RILEY, concurring in part and dissenting in part, agreed that the plaintiff's claim is not preëmpted by the NLRA and that to the extent that the claim is based upon legitimate expectations grounded in the employer's written policy statements guidelines for resolution are provided by *In re Certified Question*, 432 Mich 438 (1989). The defendant's motion for summary judgment should have been granted, however. It is not reasonable to construe the alleged oral assurances by the employer as an enforceable agreement to discharge only for cause. Subjective expectancies of continued employment do not constitute a termination-for-cause contract, and the plaintiff's claim should fail as a matter of law.

Caution should be exercised in judging the viability of a breach of contract action based solely on alleged oral representations recalled years after hiring. What is needed is a modicum of realism and common sense. "Lifetime" employment contracts are extraordinary and must be expressed in clear and unequivocal terms. In this case, the allegations are insufficient as a matter of law to provide a basis for a contract of employment that was not terminable at will.

146 Mich App 711; 381 NW2d 793 (1985) affirmed.

John W. Mason, Mary Taylor Zick, and *Theodore S. Andris, P.C.* (by *Thomas H. Bannigan*), for the plaintiff.

Fox & Grove (by *Kalvin M. Grove, Steven L. Gillman,* and *Allison C. Blakley*) and *Finkel, Whitefield & Selik* (by *Robert J. Finkel*) for the defendants.

Amici Curiae:

The Fishman Group (by *Steven J. Fishman* and

Malcolm D. Brown) for Michigan State Chamber of Commerce.

Butzel, Long, Gust, Klein & Van Zile, P.C. (by *William M. Saxton* and *David B. Calzone*), for Greater Detroit Chamber of Commerce.

BOYLE, J.

I

This is an interlocutory appeal by the defendant from the trial court's denial of its motion for summary judgment pursuant to GCR 1963, 117.2(3),[1] alleging that there is no genuine issue of material fact and that AAA is therefore entitled to judgment as a matter of law.[2] The motion was filed before defendant's answer and before any meaningful discovery.

> A motion for summary judgment filed before interrogatories and depositions are taken tests whether a cause of action has been stated, but a motion, filed after depositions and interrogatories, generally tests whether the opposing party's appropriate data raises a genuine issue as to any material fact. The function of a court in disposing of a motion for summary judgment is not to decide issues of fact, but to ascertain whether or not there is an issue of fact to be tried, resolving all

[1] Now MCR 2.116(C)(10).

[2] While AAA's trial court motion was brought on alternate ground of GCR 1963, 117.2(1), failure to state a claim upon which relief may be granted and GCR 1963, 117.2(3), it does not now claim that Bullock's amended complaint is technically deficient, i.e., that it fails on its face to state a claim for a breach of contract. The defendant's brief does touch upon an issue of indefiniteness which might be characterized as an attack upon the sufficiency of the complaint, but this issue was raised in neither the trial court nor in the Court of Appeals. My resolution of this matter is therefore limited to the GCR 1963, 117.2(3) question.

doubts as to the existence of a genuine issue of fact against a moving party. The fact allegations in the affidavits of the party opposing the motion must be considered to be true. Inferences must be viewed in the light most favorable to the party opposing the motion. [7 Callaghan's Michigan Pleading & Practice (2d ed), § 43.12, p 30.]

The timing of the defendant's motion, coupled with the failure of the defendants to specifically identify the issue as to which it believes there is no genuine issue of material fact,[3] places this case in an awkward posture for appellate review. Also, the trial court's analysis and that of the Court of Appeals focused on the employment-manual exception to employment at will and the question as to whether and under what circumstances an employer may alter policy manuals. However, turning first to the pleadings,[4] I find the following, common allegations:

3. That when Plaintiff entered the employ of Defendant he entered the employ of Defendant based upon [sic] the following promises:

a) That he would have a lifetime job as long as he did not steal;

b) that he would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent commission for sales which had been in effect for many years;

c) that if he worked hard and built up his "book of business," he would be able to earn large sums of money;

d) that if he worked hard and built up his "book of business," he could enjoy his later working years with Defendant by realizing commissions

[3] MCR 2.116(G)(4) now requires a specific identification of the allegedly undisputed issue.

[4] As MCR 2.116(G)(5) now makes clear, the pleadings may be considered in a motion for summary disposition on the ground of no genuine issue of material fact.

from the "book of business," which "book of business" is the accumulated memberships and policies which a commission salesman builds up over the years.

4. That for many years, Defendant worked very hard and built up his "book of business" in reliance upon the promises of Defendant and in order to enable him to enjoy the benefits of a large salary due to his individual efforts in developing his business.

In addition to these common allegations, count I of the first amended complaint asserts a breach of contract upon the basis of the following actions of AAA:

a) Eliminating commissions as a basis of compensation for sales persons;

b) establishing a "unit compensation" program whereby the commission salesmen would only get a certain amount of money per membership or policy rather than a percentage commission as had been promised to the commission salesmen when they entered the employ of Defendant;

c) establishing non-competitive rates for its product;

d) coercing Plaintiff and other similarly situated out of their employment thereby breaching the express and implied contract between Plaintiff and Defendant.

Finally, paragraph 7 of the first amended complaint alleges that these actions violated plaintiff's reasonable expectations based upon defendant's "policy statements," while paragraph 8 alleges a breach of oral promises:

That as a consequence of the breach of the express oral promises of Defendant, Plaintiff has lost a job which was guaranteed to be a lifetime

job in which he was told he would be able to earn large commissions.[5]

In support of its motion, AAA submitted two affidavits. The affidavit of Gerald Trocchio asserts facts relevant only to the issue of NLRA preëmption. On the other hand, the affidavit of Frederick A. Cruise, Vice President for Corporate Operations, states a number of facts relevant to the state law issues of this appeal. This affidavit essentially admits that plaintiff was discharged for failure to meet minimum production quotas imposed by AAA after reaching impasse in its negotiations with plaintiff's union. Of greatest significance, however, are paragraphs 6 and 7 of the affidavit of Mr. Cruise:

> 6. The Company has continuously reviewed and revised its employment policies. For example, examination of the Company's Sales Rules Manual reveals that the entire manual was revised on July 1, 1972, and that particular sections were again revised on November 1, 1973 and July 1, 1975. Def. Exh. A. Similarly, memorandum issued by the Company in 1971 and 1978 pertaining to minimum production requirements reveals that in 1971 sales personnel were required to sell a minimum of thirty memberships per month and in 1978 sales personnel were required to sell a minimum of twenty memberships. Def. Exh. B. Likewise, examination of the Company's "Employee Complaint Review Policy" reveals that it was revised in November, 1979, and again in April, 1981. Def. Exh. C.
>
> 7. Defendant's Exhibits A, B, and C to Defen-

[5] We are in this instance addressing a question of wrongful discharge. Plaintiff alleges that he was coerced out of his employment. Plaintiff's affidavit further alleges that he was "forced to resign." Thus, for the purposes of resolving this appeal, we accept as true that the plaintiff was discharged (as the affidavit of Mr. Cruise also sets forth).

dants' Memorandum of Law in Support of Defendants' Motion to Dismiss are true and correct copies of documents maintained by Defendants in the ordinary course of its business.

After reviewing the pleadings and affidavits, the trial court denied defendant's motion for summary judgment. Bullock submitted his own affidavit in the Court of Appeals, stating in part:

> 7. The Company never reserved the right to unilaterally change Company rules regarding grounds for demotion and/or discharge. I was clearly told by the Company at the time I was hired and many times thereafter that nobody gets fired unless they steal.
>
> 8. The Sales Rules Manual distributed to commission sales representatives, to the extent they contained any language regarding termination of employees, were not followed. During the fifteen (15) years I was with the Company, no sales representative was ever terminated for unsatisfactory performance, although some employees were admittedly not producing. The Company had both a direct promise and custom and practice that no one would get fired unless they stole.

The defendant's motion to strike this affidavit was denied by the Court of Appeals on February 2, 1985. The defendant has not renewed its motion in this Court.

The Court of Appeals affirmed the trial court's denial of the defendant's motion for summary judgment.[6]

II

We agree with part II of Justice LEVIN's opinion,

[6] *Bullock v Automobile Club of Michigan*, 146 Mich App 711; 381 NW2d 793 (1985).

concluding that plaintiff's claim is not preëmpted by the National Labor Relations Act, 29 USC 151 *et seq.* Proper resolution of the state law issues raised by the defendant requires further analysis.

III

Without identifying the nature or elements of Bullock's claim, AAA argues in support of its general assertion that no genuine issue of material fact precluded the trial court from granting its summary judgment motion. What at first blush might be oversight is undoubtedly due to a desire to preserve a position when an answer is filed, both as to the formation of the contract pled by Bullock and the existence of such a contract at the time of Bullock's discharge. The defendant's efforts to preserve these questions are sound strategy, but the pleadings and affidavits currently before us present undisputed oral promises made to Bullock at the time he entered defendant's employ. These must be deemed true.[7]

The defendant argues that a right to amend employment policies is fully consistent with the presumption of employment at will. We agree. This observation, however, is most pertinent to the plaintiff having pled in part that defendant's actions violated his reasonable expectations based on "policy statements" of the defendant, the origin and precise nature of which have not yet been identified. Bullock has also pled that the defendant's actions breached an express oral promise.

[7] Resolution of this matter is further complicated by the parties understandable melding of contract theory and the theory of legitimate expectations. Admittedly, the prior opinions of this Court have done little to clarify the relationship between these two theories. Cf. *Valentine v General American Credit, Inc*, 420 Mich 256, 259; 362 NW2d 628 (1984) with *Renny v Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986).

While the policy manual legitimate expectations analysis of *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), may have in practice obscured that portion of the opinion dealing with a contract arising from an express agreement, oral or written, it is clear that the *Toussaint* majority held both that a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable and that the contract may be established in alternative ways. According to *Toussaint*, formation may be "either by express agreement, oral or written, *or* as a result of an employee's legitimate expectations grounded in an employer's policy statements." *Id.*, p 598 (emphasis added).

The majority in *Toussaint* carefully pointed out that the enforceability of personnel policies did not turn on whether negotiations had taken place, the parties' minds had not met on the subject, the employee knew nothing of the particulars, or that the employer could change the policies unilaterally. Policy manuals in this situation were enforceable not as express promises, in quasi contract, or because of promissory estoppel, but because the Court under its common-law authority recognized the enforceability of "a situation 'instinct with an obligation,' " *id.*, p 613, an obligation distinct from and independent of contract analysis.

In *Toussaint* and *Ebling*, the Court held that there was sufficient evidence of an *express* agreement to justify submission to a jury. *Toussaint*, *supra*, p 598. While the Court in *Toussaint* also held that there was sufficient evidence of Toussaint's legitimate expectations grounded in the policy manual to submit to the jury, *id.*, p 599, apart from the employment manual upon which Toussaint's legitimate expectations were based,

four members of the Court found that testimony as to the promises of Allen R. Schaedel, the defendant's treasurer, created a jury-submissible issue as to whether there was a discharge-for-cause contract.

In *Ebling*, the corporate vice president, Richard Manoogian, promised that, if anything detrimental came up between Ebling and his immediate supervisor regarding Ebling's performance, Manoogian would personally review Ebling's performance and give him a chance to "correct things." The plaintiff testified that Manoogian further promised Ebling that, if he was doing the job, he would not be discharged. *Id.*, p 626 (separate opinion of RYAN, J.). All members of the Court, Chief Justice COLEMAN, and Justices KAVANAUGH, WILLIAMS, MOODY, LEVIN, RYAN, and FITZGERALD, agreed that this testimony created a jury- submissible issue as to whether plaintiff's employment was not terminable at will but only for cause. *Id.*, pp 633-644.

To paraphrase the language in *Toussaint, id.*, p 611, and illustrate the distinction between the alternative theories of "enforceability" there recognized, suppose that a policy manual providing for employment at will was extant at the time an employee was hired. Could it be said that such a manual, as a matter of law, precluded the enforceability of a later written contract providing "in so many words" that the employee could not be discharged except for cause? We think not. Likewise, it cannot be said that where an express agreement is alleged preceding an employment manual, the alleged promise is, as a matter of law, unenforceable.[8]

[8] I note, but decline to address, the defendant's argument that an oral contract of employment in this context violates the Michigan Statute of Frauds. MCL 566.132; MSA 26.922. The defendant failed to raise this issue in the trial court and the matter is therefore not

In *In re Certified Question* we have today said that the obligation recognized by the policy manual leg of *Toussaint* does not preclude employers from amending employment manuals. *In re Certified Question* does not, however, do more than establish that discharge-for-cause policy provisions may be modified on the basis of "reasonable notice of the change . . . uniformly given to affected employees," issues which the defendant's affidavit understandably does not address. It does not establish that amendments to employment manuals must be construed to be modifications of a distinct, express, or implied-in-fact contract. As the pleadings and affidavits stand, Bullock alleges an oral contract for hire in which the employer limited his right to terminate, not employment at will.

It is true, as the defendant contends, that indefinite hirings have been considered to be terminable at will. 9 Williston, Contracts, § 1017, p 131. However, as recognized by both the *Toussaint* majority and dissent, this rule, properly conceived, has never been more than one of construction.[9] *Toussaint, supra,* pp 597, 650. Bullock has alleged an oral contract of employment containing a discharge-for-cause provision and the defendant's affidavits do not rebut that allegation. This allegation sets forth a claim under the holding in *Toussaint* that the express promise of the employer *apart* from the employment manual may create a jury-submissible issue.

The extent of plaintiff's reliance on policy manuals and the effect of the manuals submitted by the

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properly before this Court. Whether the Legislature should reconsider and reformulate the statute of frauds is also a matter not properly before the Court.

[9] In this regard, both *Toussaint* and *Lynas v Maxwell Farms*, 279 Mich 684, 687; 273 NW 315 (1937), depart from the rule under which employment at will is treated as a substantive limitation on the enforcement of contracts (post, pp 517–518, GRIFFIN, J.).

defendant cannot be resolved on this record. These matters may be raised on remand in light of *In re Certified Question*. However, as to plaintiff's allegation of an *oral* promise, plaintiff's pleadings, which must be deemed true, allege a breach of discharge-for-cause employment under *Toussaint*. The employment manuals submitted by the defendant, to the extent that they do not constitute unilateral modification of the policy basis of plaintiff's claim, must be seen on this record as an *offer* to modify the discharge-for-cause provision of Bullock's alleged express contract and do not entitle the defendant to summary disposition.

The determination of the effect of these manuals on Bullock's allegations must await further discovery and perhaps trial. We do not, at this point, know basic facts such as who made the alleged promises to Bullock and under what circumstances the promises were made. Nor do we know whether the policy manuals referenced in the Cruise affidavit constituted an offer of modification, and, if so, whether there is a genuine issue of fact as to whether Bullock accepted the offer.[10] Finally, we

[10] It also should be noted there are factors in the complaint which may bring it within the distinguishing features holding of *Ebling v Masco Corp*, separate opinion by RYAN, J., pp 633-634. It appears that Bullock was initially employed as a commission salesman whose income was derived in part from commissions paid for renewals on his book of business and that Bullock was induced to work particularly hard during the earlier years of his employment so that he might later enjoy the fruit of his efforts derived from renewal commissions. Bullock's contract was similar to that of Ebling in which continued employment was necessary to give the employee the full benefit of a stock option plan. We, of course, express no opinion on this question.

Facts similar to these have fueled the growing body of case law extending the duty of good faith to discharges under employment-at-will contracts. See, e.g., *Fortune v Nat'l Cash Register Co*, 373 Mass 96; 364 NE2d 1251 (1977); *Maddaloni v Western Mass Bus Lines, Inc*, 386 Mass 877; 438 NE2d 351 (1982); *Cook v Alexander & Alexander*, 40 Conn Supp 246; 488 A2d 1295 (1985); *K mart Corp v Ponsock*, 732 P2d 1365 (Nev, 1987); *Foley v Interactive Data Corp*, 47 Cal 3d 654; 254 Cal Rptr 211; 765 P2d 373 (1988).

As one commentator has observed:

do not know at this point whether the alleged promise of "a lifetime job as long as he did not steal" was either intended by the defendant or understood by Bullock in the literal sense which disturbs the dissent.[11]

In sum, to the extent that plaintiff relies on policy manuals as the basis for his claim, *In re Certified Question* provides the guidelines for resolution on remand as to whether unilateral change in the policy manuals would be effective. However, defendant's assertion of a change in policy manuals does not, on this record, establish that there is no genuine issue of material fact as to whether the plaintiff had an enforceable contract containing a limitation on discharge. The defendant is not entitled to judgment as a matter of law.

Although not all courts have recognized exceptions or limitations to the employment at will doctrine, courts in thirty-two states have adopted public policy exceptions, eleven states have applied the covenant of good faith and fair dealing, and twenty-nine states have used employee handbooks to find contractual limitations on terminations. A total of thirty-nine states now employ one or more theories to qualify the employment at will doctrine. [Summers, *Labor law as the century turns: a changing of the guard*, 67 Neb L R 7, 13-14 (1988).]

[11] It is perhaps the isolation in which this promise has been reviewed in the partial concurrence and partial dissent of Justice GRIFFIN which caused such a stir. As Professor Corbin has explained, however:

> There is no doubt that indefiniteness of terms of an agreement is a factor that will be given some weight, even though standing alone it would not be decisive. It may be the factor that is chiefly stressed in a judicial opinion, in a case that involved elements of unfairness or fraud or disloyalty. Where no such elements exist, and the employee has so greatly changed his position that a more limited remedy is inadequate, the court is more ready to fill gaps by liberal interpretation and by inferences from the performances already rendered. [1 Corbin, Contracts, § 96, p 422.]

IV

CONCLUSION

Bullock has pled an action for a breach of an oral contract of employment alleged to have arisen at the commencement of his employment. The defendant's affidavits in regard to its policy manuals do not entitle the defendant to judgment under GCR 1963, 117.2(3).

We affirm the decisions of the trial court and the Court of Appeals denying the defendant's motion for summary judgment and remand the case to the trial court for further proceedings consistent with this opinion and *In re Certified Question*.[12] We do not retain jurisdiction.

BRICKLEY, CAVANAGH, and ARCHER, JJ., concurred with BOYLE, J.

LEVIN, J. William J. Bullock claims that the Automobile Club of Michigan breached an oral contract of employment when it discharged him for failing to achieve production standards set forth in a revision of its sales rules manual. AAA asserts that it had the right to revise minimum production standards, although the right to do so was not expressly reserved in the manual, and that, in all events, Bullock's claim is preëmpted by the National Labor Relations Act.

The instant case was argued together with *In re Certified Question*, 432 Mich 438; — NW2d — (1989), also decided today. In *In re Certified Question*, this Court holds that an employer may, without an express reservation of the right to do so,

[12] We recognize the limited nature of this response to an invitation to address far broader questions regarding modification of the oral promise recognized in *Toussaint*. If we are to exercise that authority responsibly, we must proceed carefully on a record developed by adversaries where much more than what is now before us is known.

unilaterally change a discharge-for-cause written policy statement to a terminable-at-will policy.

In *In re Certified Question*, there was no dispute concerning the terms of the employment contract. The stated question posited that the terms of the employee manual had become terms of the employment contract. The dispute was whether the employer could unilaterally change a policy stated in the employee's manual that had become a term of the employment contract. Here, the central question is what were the terms of the employment contract, specifically, whether the provisions of the sales rules manual concerning minimum production standards were terms of the employment contract, as claimed by AAA, or whether, as claimed by Bullock, the provisions of the sales rules manual were inconsistent with an orally agreed upon employment contract and not terms of the contract.

A majority of the Court agrees with the circuit judge and the Court of Appeals[1] that the question what were the terms of the employment contract should not have been decided on the motion for summary disposition. The question should be decided by the trier of fact following a trial at which employer and employee witnesses testify.

We all agree with the circuit judge and the Court of Appeals that Bullock's claim is not preëmpted by the National Labor Relations Act. The National Labor Relations Act does not address the state law claims set forth in Bullock's complaint. Bullock's claims do not concern conduct Congress intended to leave unregulated by state law. Although a union was certified, no collection bargaining agreement was entered into between

[1] *Bullock v Auto Club of Michigan*, 146 Mich App 711; 381 NW2d 793 (1985).

AAA and the union. The state law claims of the members of the union were not instantly extinguished when the union was certified, before negotiations for a collective bargaining agreement began and without regard to whether a collective bargaining agreement was entered into.

I

AAA terminated Bullock's employment as a commission sales representative after employing him in that capacity for nearly fourteen years. Bullock remained at AAA working as a salaried sales employee, a member advisor. Bullock commenced this action alleging that the termination of his employment as a commission sales representative and changes in his compensation breached his oral contract of employment. Bullock based his claim of an oral employment contract on statements assertedly made to him when he was employed as a sales representative with AAA in May, 1968. According to Bullock, he was told that (1) he would have a lifetime job with AAA as long as he did not steal; (2) he could work as a commission sales representative for AAA and continue to receive a seven percent commission for insurance sales; and (3) if he worked hard and built up his "book of business," he would enjoy his later working years by realizing substantial commissions from that "book of business."

In 1978, AAA changed its method of compensation for commission sales representatives, substituting a "unit compensation plan" for the straight seven percent commission system. In September, 1981, AAA adopted production standards and a disciplinary procedure to be followed when sales representatives failed to meet the new standards. In February, 1982, Bullock was terminated as a

commission sales representative after failing to meet AAA production standards.[2]

Bullock contends that the production standards were not imposed to increase productivity, but were part of a scheme to "eliminate senior and older commission sales representatives from the staff" because the standards did not take "into consideration the fact that the senior commission salesmen had to spend disproportionate amounts of their time in servicing existing accounts, rather than seeking out new business." Bullock asserts that AAA decided to eliminate senior commission salesmen and replace them with "younger, lower paid salaried personnel." In addition to pleading a claim for breach of contract, Bullock also claimed that AAA is liable for unjust enrichment,[3] conversion,[4] age discrimination,[5] and negligent evaluation.[6]

AAA did not answer Bullock's complaint. AAA

[2] In the termination letter, AAA offered Bullock a salaried position as a "member advisor."

[3] Bullock claims that in taking back his "book of business" when he was terminated as a sales representative, AAA was unjustly enriched.

[4] Bullock claims he had a property right in his "book of business" and that property right was taken from him as a result of wrongful acts of AAA.

Bullock claims that he was promised a lifetime job as long as he did not steal and commissions of seven percent of the "book of business" that he might build up, and "that if he worked hard and built up his 'book of business,' he could enjoy his later working years with [AAA] by realizing commissions from the 'book of business,' which 'book of business' is the accumulated memberships and policies which a commission salesman builds up over the years."

In *Follmer, Rudzewicz & Co v Kosco*, 420 Mich 394; 362 NW2d 676 (1984), this Court recognized that an employer has a property interest in insurance renewals that it may protect by contract. See also *Lichnovsky v Ziebart Int'l*, 414 Mich 228; 324 NW2d 732 (1982). Bullock claims a property interest in the renewals arising as a result of contract.

[5] Bullock alleges that the production standards were designed to displace senior and older commission salespersons.

[6] Bullock alleges that AAA breached a duty to perform accurate, reasonable and fair performance evaluations.

moved for accelerated judgment, claiming that Bullock's cause of action was preëmpted by federal labor law and, therefore, a state court lacked jurisdiction to hear the matter.[7] AAA alternatively

[7] AAA's motion for accelerated judgment, or in the alternative summary judgment, sought judgment in its favor pursuant to GCR 1963, 116 and 117, on the grounds that "*first*, the Court lacks jurisdiction of the subject matter; *second*, Plaintiff has failed to state a claim upon which relief can be granted; and, *third*, there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law . . . ."

The memorandum of law in support of the motion contained the following headings:

> A. The Complaint Must Be Dismissed In Accordance With Principles Of Federal Preëmption.
>
> 1. Plaintiff's *Toussaint* Claim Is Preëmpted Because It Seeks To Disrupt The Balance Of Economic Power Under Federal Law.
>
> a. States Are Precluded From Interfering With The Policy Of Free Collective Bargaining Established By Federal Law.
>
> b. The Employer's Federal Right To Make A Good Faith Unilateral Change Cannot Be Infringed By A State Cause Of Action.
>
> c. A Law Of General Applicability Is Nonetheless Preëmpted If Its Application Would Frustrate The Federal Scheme.
>
> 2. Plaintiff's *Toussaint* Claim Is Also Preëmpted Because It Seeks To Regulate Conduct Exclusively Within The Unfair Labor Practice Jurisdiction Of The NLRB.
>
> B. The Complaint Must Be Dismissed Because The Supreme Court Of Michigan Never Intended *Toussaint* To Apply In A Union Context.
>
> C. The Complaint Must Be Dismissed Because *Toussaint* Expressly Protects An Employer's Right To Make A Unilateral Change.
>
> D. The Complaint Must Be Dismissed Because The Company Never Breached Plaintiff's Alleged Rights Under *Toussaint*.

Affidavits of two AAA employers were attached. One, who served on AAA's bargaining team in the negotiations with the Michigan AAA Sales Association, described the negotiating process, the impasse, and the implementation of production standards contained in AAA's final offer. The other, referred to the implementation of the final offer, stated that seventy-five of the company's 570 sales personnel, including Bullock, failed to meet the new minimum production standards, were terminated, and were offered alternative employment as salaried employee advisors which they all accepted. This affidavit further states that Bullock received all commissions that were due him and describes revisions in its employment policies referred to in the text

moved for summary judgment, claiming that Bullock had failed to state a claim on which relief could be granted and that AAA was entitled to judgment because (1) *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980), is not applicable to unionized employees, (2) *Toussaint* provided that employers may make unilateral policy changes, and (3) under the common-law requirements of *Toussaint*, AAA did not breach any of Bullock's contract rights. The basis of decision proposed in the dissenting opinion was not stated in AAA's motion or supporting brief.

The circuit judge found that Bullock's claims were not preëmpted by federal law and denied AAA's motion for accelerated judgment. He also rejected the arguments made in support of AAA's motion for summary judgment. The Court of Appeals Affirmed.[8]

AAA raises the following questions in this Court:

1. May an employer revise its personnel practices, including required standards of job performance, notwithstanding that some employees might not have been aware that the policies previously in effect were subject to revision?

2. Do the undisputed facts demonstrate, as a matter of law, that Bullock knew or should have

following n 26. A copy of the sales rules manual as revised July 1, 1972, was also attached.

Plaintiff's complaint alleged breach of contract. An amended complaint was filed after AAA's motion for accelerated and summary judgment was filed that added counts for unjust enrichment, conversion, age discrimination, and negligent evaluation. The allegations describing the alleged contract in the amended complaint are, however, identical with those in the original complaint. AAA did not file an amended motion or change its arguments after the filing of the amended complaint. The circuit judge delivered his opinion immediately after the amended complaint was filed, but the order denying the motion was not entered for almost two months.

[8] *Bullock v Automobile Club of Michigan*, 146 Mich App 711; 381 NW2d 793 (1985).

known that AAA's personnel policies were subject to revision?

3. May employees—on whose behalf a union has negotiated wages, hours and working conditions—invoke pre-union, individual contract rights to supersede the lawful results of the negotiations?

A majority of the Court affirms the Court of Appeals and the circuit court denials of AAA's motion for accelerated and summary judgment.

II

We first address the question whether the circuit court lacked jurisdiction of the subject matter because Bullock's state-law claims were preëmpted by the NLRA.

A

When Bullock was hired in 1968, AAA's sales employees were not represented by a union. On February 7, 1978, the Michigan AAA Sales Association was certified as the exclusive bargaining representative for AAA's commission sales representatives. Although AAA and the union met numerous times to negotiate a collective bargaining agreement, they failed to reach an agreement because the union would not accede to AAA's demand that the agreement contain minimum production standards. AAA's final offer included a proposal for minimum production standards. On August 5, 1981, the union rejected this final offer at a general meeting of its membership, thus creating an impasse in the bargaining. After further attempts to negotiate a collective bargaining agreement failed, the union was decertified in October, 1982.

AAA implemented the proposed production stan-

dards on September 1, 1981. Accompanying the production standards was a disciplinary procedure providing that a sales representative who did not meet a production standard during any month would receive an oral warning. If the representative failed to meet the standards for four successive months, he would receive a written warning, probation, and would ultimately be subject to demotion or termination.

AAA contends that Bullock's termination was lawful because he was discharged for failing to meet AAA's production standards after AAA followed the steps outlined in its disciplinary procedure. AAA and the amicus curiae, Michigan State Chamber of Commerce, argue that Bullock's claim is preëmpted for two reasons: (1) AAA's right to impose production standards is within the exclusive jurisdiction of the National Labor Relations Board, and (2) Bullock's state law claims disrupt the collective bargaining process by attempting to deprive AAA of an economic weapon of self-help, namely, the right to implement a final offer after an impasse.

Bullock responds that state courts retain jurisdiction of state- law claims where the parties have not entered into a collective bargaining agreement and where the litigation does not concern federal interests, but rather discrete state interests.

B

The United States Supreme Court has developed two doctrines for determining whether a state claim is preëmpted by the NLRA.[9] One doctrine, set

[9] *Golden State Transit Corp v Los Angeles*, 475 US 608, 613; 106 S Ct 1395; 89 L Ed 2d 616 (1986); *Metropolitan Life Ins Co v Massachusetts*, 471 US 724; 105 S Ct 2380; 85 L Ed 2d 728 (1985).

Another line of federal preëmption, preëmption under § 301(a) of

forth in *San Diego Building Trades Council v Garmon*, 359 US 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959), established that state regulations and causes of action are preëmpted when they concern an activity that is actually or arguably protected or prohibited by the NLRA. The state claim may survive, however, if the conduct at issue "is of only peripheral concern to the federal law or touches interests so deeply rooted in local feeling and responsibility . . . ."[10] The court balances the state's interest in regulating or promoting a remedy for the conduct against the intrusion in the NLRB's jurisdiction and the risk that the state's determination will be inconsistent with provisions of the NLRA.

The second preëmption doctrine originated in *Machinists v Wisconsin Employment Relations Comm*, 427 US 132; 96 S Ct 2548; 49 L Ed 2d 396 (1976), and was "designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected from employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act."[11] *Machinists* preëmption prohibits state regulation and state law claims involving conduct that Congress intended to remain unregulated, namely, the use of

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the Labor Management Relations Act of 1947, 61 Stat 156, 29 USC 185(a), is not pertinent because the interpretation of a collective bargaining agreement is not involved. *Lingle v Norge Div of Magic Chef, Inc*, 486 US —, —; 108 S Ct 1877, 1880-1881; 100 L Ed 2d 410 (1988). *Teamsters v Lucas Flour Co*, 369 US 95; 82 S Ct 571; 7 L Ed 2d 593 (1962). AAA's reliance on *Nat'l Metalcrafters, Div of Keystone v McNeil*, 784 F2d 817 (CA 7, 1986), and *Serrano v Jones & Laughlin Steel Co*, 790 F2d 1279 (CA 6, 1986), is misplaced as both cases involve § 301 preëmption.

[10] *Belknap, Inc v Hale*, 463 US 491, 498; 103 S Ct 3172; 77 L Ed 2d 798 (1983); *San Diego Building Trades Council v Garmon*, 359 US 236, 243-244; 79 S Ct 773; 3 L Ed 2d 775 (1959).

[11] *Metropolitan Life Ins Co v Massachusetts*, n 9 *supra*, p 749.

economic weapons of self-help by labor and management.[13]

AAA and the amicus curiae, MSCC, argue that Bullock's action is preëmpted under both the *Garmon* and *Machinists* branches of NLRA preëmption doctrine.

C

We first examine Bullock's state law claims in light of the *Garmon* doctrine of preëmption. *Garmon* provides:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[15]

Section 8(a)(5) states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[14] Section 8(d) defines the duty "to bargain collectively" as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."[15] Although an employer's unilateral change in the conditions of employment then *under* negotiation is a violation of § 8(a)(5), an employer is generally permitted to make such changes following an impasse in negotiations.[16]

AAA and MSCC assert that implementation of

[13] *Id.*

[15] *Garmon, supra*, p 245.

[14] 29 USC 158(a)(5).

[15] 29 USC 158(d).

[16] See *NLRB v Katz*, 369 US 736, 743; 82 S Ct 1107; 8 L Ed 2d 230 (1962).

production standards after an impasse is at least arguably protected by § 8. Bullock contends, however, that state law claims are not within the scope of § 7 or § 8. According to Bullock, the instant action does not require that this Court consider AAA's imposition of new standards of production;[17] rather, the action concerns oral statements made to Bullock that allegedly gave rise to a contract of employment.

The United States Supreme Court declared in *Sears, Roebuck & Co v Carpenters*, 436 US 180, 197; 98 S Ct 1745; 56 L Ed 2d 209 (1978), that preëmption analysis should focus on whether the state court controversy is identical with or different from that which *could* have been presented to the NLRB:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but *whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board.* For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. [Emphasis added.]

In *Belknap, Inc v Hale*, 463 US 491; 103 S Ct 3172; 77 L Ed 2d 798 (1983), the United States Supreme Court ruled that employees hired to replace striking workers could pursue causes of action for misrepresentation and breach of contract

[17] Bullock's amended complaint eliminates an allegation in his original complaint that the imposition of production standards (quotas) by AAA constituted a breach of contract.

in state court.[18] The Court found preëmption to be inappropriate because, among other reasons, an action before the NLRB could not address or in any way remedy the wrongs suffered by the plaintiffs.

Following the *Belknap* and *Sears* analyses, we conclude that the substance of Bullock's state law claims significantly differ from any claims he could have presented to the NLRB. The state law claims require a determination of what were the terms of Bullock's employment contract and whether certain actions by AAA[19] breached that contract. The NLRB, on the other hand, is concerned with the *process* of bargaining. The board would decide whether an impasse in bargaining had occurred before AAA's implementation of the production standards contained in its last offer at the bargaining table. The NLRB would not look at any particular provision of an employment contract in evaluating the question whether an impasse had occurred.[20]

Bullock's state law claims could not have been presented to the NLRB because the NLRB would not and could not determine Bullock's state law claims. The NLRB would not have provided a rem-

[18] In recent years, *Garmon* has been applied flexibly, "especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v Carpenters*, 430 US 290, 302; 97 S Ct 1056; 51 L Ed 2d 338 (1977). The United States Supreme Court has expanded the exception to *Garmon* preëmption to provide state courts with jurisdiction in actions involving "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon, supra*, p 244.

[19] See n 17.

[20] AAA relies on *UA 198 Health & Welfare, Education & Pension Funds v Rester Refrigeration Service*, 790 F2d 423, 426 (CA 5, 1986), where the United States Court of Appeals for the Fifth Circuit held that primary jurisdiction of the matter belonged to the NLRB because the "key issue on the merits is whether the parties have reached *an impasse*." (Emphasis added.)

edy for his state law claims and, therefore, would not have provided a remedy for his discharge from AAA. Bullock's state law claims and any claim he could bring before the NLRB are not identical but rather separate and discrete. Allowing Bullock to proceed on his state law claims poses no risk of interference with the jurisdiction of the NLRB.

D

AAA and MSCC also contend that Bullock's claims are preëmpted under the *Machinists* rationale because maintenance of a state law action would thwart the effective implementation of the NLRA. They argue that an employer's right to impose its final offer when the parties fail to reach a collective bargaining agreement is one of the employer's most powerful economic self-help weapons. They contend that Bullock's action threatens to interfere with the collective bargaining process in a way Congress did not intend.

Machinists preëmption becomes relevant where the action lies outside the reach of *Garmon*. It "protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Metropolitan Life Ins Co v Massachusetts*, 471 US 724, 749; 105 S Ct 2380; 85 L Ed 2d 728 (1985). Under the *Machinists* doctrine,

> Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes."[21]

[21] *Machinists*, *supra*, pp 147-148.

Bullock's action is essentially an ordinary contract action, routinely heard in state court. The United States Supreme Court observed in *Belknap*:

> The interests of the Board and the NLRA, on the one hand, and the interest of the State in providing a remedy to its citizens for breach of contract, on the other, are "discrete" concerns . . . . We see no basis for holding that permitting the contract cause of action will conflict with the rights of either the strikers or the employer or would frustrate any policy of the federal labor laws. [*Id.*, p 512.]

E

The MSCC maintains that once a union is certified, the terms and conditions of employment are covered exclusively by federal labor law, not state law. Because Bullock was discharged for failure to meet the production standards, the MSCC reasons that the circumstances surrounding the implementation of those standards is central to Bullock's state law claims and necessitates a finding of preëmption. We disagree.

The selection of a union representative did not instantly extinguish Bullock's state law claims or contract rights. Employees would hesitate to cast their lot with a union if they were deemed to have forgiven their common-law contract and other claims when a collective bargaining agent was certified without regard to whether a collective bargaining agreement is entered into. The United States Supreme Court, in *J I Case Co v NLRB*, 321 US 332, 336-337; 64 S Ct 576; 88 L Ed 762 (1944), said:

> Care has been taken in the opinions of the Court

> to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment, because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue work after a collective agreement expires and, despite negotiation in good faith, *the negotiation may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.* [Emphasis added.]

When a collective bargaining agreement expires and the parties are unable to agree on the terms of a new agreement, an employer may implement its final offer after impasse. In the instant case, however, no collective bargaining agreement was ever agreed upon and the union was decertified before Bullock was discharged.[28] Where no agreement is reached, enforcement pursuant to state law of preëxisting state law contract rights and other state law claims does not "frustrate any policy of the federal labor laws." *Belknap, supra,* p 512.

In sum, we conclude that state court jurisdiction of Bullock's state law claims is not preëmpted under the *Garmon* branch or the *Machinists* branch of federal preëmption doctrine. The circuit court has jurisdiction of the subject matter.

III

AAA claims that it is entitled to summary judg-

[28] We also reject AAA's assertion that employees who have been unionized cannot bring a *Toussaint*-based cause of action. See *Lingle*, n 9 *supra*. As the circuit judge correctly noted, *Toussaint* made no exception for unionized employees.

ment because Bullock failed to state a claim on which relief can be granted and there is no genuine issue of material fact.

A

A motion for summary judgment for failure to state a claim "seeks to test the genuineness of a claim by challenging the *legal* adequacy of the pleadings."[23] The standard in evaluating such a motion "is whether plaintiff's claim, on the pleadings, is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery."[24] In assessing the motion, the trial court "does not act as a factfinder, nor does the court attempt to probe the parties' ability to prove their allegations."[25] The court thus "accepts as true all well-pleaded facts."[26]

Toussaint held enforceable contractual rights grounded in an employee's legitimate expectations generated by an employer's statements of policy.[27]

[23] *Abel v Eli Lilly & Co*, 418 Mich 311, 323; 343 NW2d 164 (1984), cert den 469 US 833 (1984).

[24] *Id.*, p 323.

[25] *Id.*, p 324.

[26] *Id.*

[27] Contrary to the argument of amicus curiae, the scope of *Toussaint* is not limited to discharge-for-cause contracts. While *Toussaint* focused on the question whether the specific discharge-for-cause statement contained in the employer's policy manual and oral statements to that effect gave rise to a binding contract, the Court's holding was phrased in broad terms; the court said that "employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees . . . ." *Id.*, pp 614-615. The Court also said that "[r]ecognition that contractual obligations can be implicit in employer policies and practices is not confined to cases where compensation is in issue," *id.*, p 617, thereby indicating that express policies other than those pertaining to job security can, in a proper context, become binding.

Any policy statement, then, may give rise to a contractual obligation under *Toussaint*. A policy statement in a manual or in a casual conversation with a superior does not, however, automatically rise to the level of a contract. Only those statements that create legitimate expectations in a reasonable employee are actionable. See n 31.

Before a court can address the question of an employee's legitimate expectations arising from such statements of policy, the trier of fact must determine which employer statements, oral and written, were a part of the contract of employment. Because this involves a factual inquiry in the instant case, the circuit judge properly denied summary judgment.

We are bound to accept all well-pleaded facts as true when reviewing the ruling on AAA's motion for summary judgment. The oral employment contract, as described by Bullock, supports a claim for breach of contract. Bullock alleged that his oral contract of employment provided that AAA would terminate him only if he were caught stealing and that he would be compensated on a seven percent commission plan based on his "book of business." Bullock's pleadings presented questions of fact whether AAA breached the alleged contractual provisions. Bullock has sufficiently stated a claim on which relief could be granted.

Nor did the oral statements made to Bullock at the time of hiring necessarily lack the definiteness required to form a binding contract as a matter of law. Oral statements may be as binding as written statements.

AAA filed an affidavit in support of its motion for summary judgment, asserting that it had continuously reviewed and revised its employment policies. The affidavit stated that the sales rules manual was revised in July, 1972, November, 1973, and July, 1975, and that memoranda issued by AAA in 1971 and 1978 required 1971 sales personnel to sell a minimum of thirty memberships per month, and 1978 sales personnel to sell a minimum of twenty memberships.

Bullock relies on an oral contract of employment allegedly entered into when he was hired in May,

1968, two or three years before the earliest memoranda adverted to in AAA's affidavit. He asserts that AAA cannot avoid its contractual obligations resulting from the claimed oral employment contract by later promulgating inconsistent general policies that apply to all employees. He notes that the record is sparse because virtually no discovery has been conducted, and that AAA has not filed an answer and thus has not denied the oral promises asserted by Bullock. He states that the general provisions of the sales rules manual pertaining to production standards and continued employment contradict the express oral agreements regarding compensation and job security that were negotiated terms of the oral employment agreement and that the arguments advanced by AAA and amicus curiae obscure the real issue: "Did the Auto Club agree to employ Bullock as a commission salesperson at a rate of seven percent commission on all new sales and renewals and to restrict its right to discharge Bullock for reasons other than dishonesty or theft?"

Preliminary and central questions are whether the terms alleged by Bullock in his complaint were the terms of the contract of employment, and whether and to what extent provisions of the sales rules manual, consistent or inconsistent with the terms alleged, were part of the contract of employment. It is a separate question whether provisions of the sales rules manual that were in fact part of the contract could, consistent with legitimate expectations generated by AAA's policy statements set forth in the sales rules manual, be revised in the manner AAA claims it had the right to revise them.

B

AAA asserts that, under *Toussaint*, it was enti-

tled to make unilateral changes in policy, including the change in the compensation structure and the implementation of production standards. It therefore follows, according to AAA, that these changes could be made and enforced regardless of rights and duties previously established.

AAA further reasons that just as employers have a common-law right to terminate an employee at will who is hired for an indefinite term, they may similarly rescind at will a personnel policy implemented for an unspecified period where the employer has not demonstrated an intention of maintaining such a policy permanently. AAA suggests that while an employee can reasonably expect that an employer will apply its current policies uniformly, an employee cannot, given the routine changes that businesses must periodically make, expect that policies will continue to be in force indefinitely.

While *Toussaint* did state that the employer could make unilateral policy changes,[28] that statement should be read in light of *Toussaint*'s primary holding that an employee may enforce legitimate expectations that have been generated by an employer's statements of policy.[29]

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[28] *Toussaint*, *supra*, pp 613-615.

[29] An employer who establishes no personnel policies instills no reasonable expectations of performance. Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force. Employees could, however, legitimately expect that policies in force at any given time will be uniformly applied to all. If there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the

It is not possible to answer AAA's question—whether it could unilaterally revise its policies set forth in the sales rules manual, including required standards of job performance—in the abstract. That question can only be answered after the trier of fact has defined the terms of Bullock's contract of employment, including the extent, if at all, the provisions of the sales rules manual are terms of the contract and, if they are, the court[38] has determined what legitimate expectations would be generated in a reasonable employee as a result of those contractual terms.

There will be situations where the employer's unilateral changes in policy are consistent with its employees' legitimate expectations without regard to whether the employer has given explicit notice that its policies are subject to change or has established a pattern of revising its policies periodically. Notice is not the critical issue, although it may be a relevant factor.

The proper focus is the legitimate expectations of the reasonable employee. Certain policies may not involve subject matter of sufficient significance to engender legitimate expectations worthy of enforcement. Similarly, changes, even when made with respect to critical terms of employment, may be so minor that there is little or negligible interference with employee legitimate expectations.

In determining what a reasonable employee in Bullock's position might legitimately expect, the court might consider, among other things, such factors as the nature of the change, whether changes in that regard have previously been made and implemented, length of employment and job

work force, the employer may not treat its promise as illusory. [*Toussaint, supra*, p 619.]

[38] See n 34.

status before and after the policy change.[31] Because Bullock claims that the production standards and adoption of the "unit compensation" plan had a more severe effect on senior commission sales representatives with commitments to large "books of business," the extent of the commitment involved in servicing Bullock's "book of business" should also be examined.

In joining in the affirmance of the Court of Appeals conclusion that summary judgment was properly denied, I do not wish to be understood as stating that an employer may only make unilateral changes where the employees have been given specific notice that the employer has reserved the right to do so. An employer retains the right to unilaterally modify its policies where the change will not defeat the legitimate expectations of its employees.

IV

AAA maintains that unilateral contract principles bind Bullock to AAA's revisions regardless of the original terms of the employment contract. Under this analysis, when an employer unilaterally changes its policies, an employee's continued performance constitutes consideration for, and acceptance of, the new terms of employment. An employee is then bound by the new terms and can no longer rely on the employer's prior policies.

In *In re Certified Question*, this Court considered unilateral contract analysis in a case concerning an employer's unilateral change from a discharge-for-cause policy to a termination-at-will policy, and

[31] Neither *Valentine v General American Credit, Inc*, 420 Mich 256; 362 NW2d 628 (1984), nor any other decision of this Court supports the statement in the dissenting opinion that the rationale of *Toussaint* "has been confined by this Court to claims of wrongful discharge." *Post*, p 521. See n 27.

said that it found "unilateral contract theory . . . inadequate as a basis for [its] answer. . . ."[22]

Even if the revision in the manual in *In re Certified Question* from discharge for cause to termination at will was an offer by Storer Broadcasting Company of a change in the employment contract, there was no reason to suppose that the plaintiff, Kenneth Bankey, accepted such an offer. See *Thompson v Kings Entertainment*, 653 F Supp 871 (ED Va, 1987), where the court said that the employer failed to show that the employee had accepted the revision in policy from dismissal for cause to termination at will. In *Pine River State Bank v Mettille*, 333 NW2d 622 (Minn, 1983), and *Duldulao v St Mary of Nazareth Hosp Ctr*, 115 Ill 2d 482; 505 NE2d 314 (1987), the employers distributed manuals that conferred greater rights on the employees. In such a case, it is ordinarily reasonable to find that the employee accepted the beneficial terms.

V

AAA is concerned that the Court of Appeals decision in *Bullock* provides an employee access to a jury if he merely claims that he interpreted his employer's oral statements or practices as establishing policies inducing his reliance. Amicus curiae also expresses concern that submitting such issues to a jury will inevitably strip employers of the right to change their policies. Both AAA and amicus curiae maintain that juries are inherently biased toward employees and thus are incapable of rendering a just verdict in this context. They fear that employment discharge cases ask juries of laymen to second-guess the complicated decision-

[22] *In re Certified Question*, 453.

making processes of corporate and small business employers.

The preliminary and central question of what the terms of the employment contract in fact are is clearly a question for the trier of fact, a jury where one has been requested. Contract interpretation may present a question of law.[33] Once the trier of fact has determined what are the terms of the employment contract, the separate question of what legitimate employee expectations were generated by employer policy statements found to be a part of the contract is a question of law[34] for the Court.[35]

VI

The dissenting opinion would dismiss the complaint for failure to state a claim on a ground not

[33] See Farnsworth, Contracts, § 7.14, pp 515-517.

[34] In the following areas of law, judges consider facts to resolve questions of law: public figure status in libel actions, *Rosenblatt v Baer*, 383 US 75; 86 S Ct 669; 15 L Ed 2d 597 (1966), former jeopardy, *Mitchell v Forsyth*, 472 US 511, 528; 105 S Ct 2806; 86 L Ed 2d 411 (1985), immunity for members of Congress, *id.*, probable cause in an action for malicious prosecution, *Koski v Vohs*, 426 Mich 424; 395 NW2d 226 (1986), promissory estoppel, *C & K Engineering Contractors v Amber Steel Co, Inc*, 23 Cal 3d 1, 7-8; 151 Cal Rptr 323; 587 P2d 1136 (1978).

It may be the court's duty to determine what conduct is "reasonable" in a given context. The Fourth Amendment protects against unreasonable searches and seizures. Although there is a large factual quotient in the resolution of what constitutes an "unreasonable" search and seizure, this voluminous body of law—LaFave, Search & Seizure (2d ed), which now comprises four volumes—has been developed by judges sitting without a jury who have, in the application of tests enunciated by the United States Supreme Court and other courts, elucidated at great length on what is "reasonable" and "unreasonable."

[35] Depending on the nature of the factual dispute requiring jury resolution, the court might either instruct the jury regarding the legitimate expectations that would arise if it finds for the employee on the disputed factual issues or, if that does not appear feasible or desirable, await before ruling thereon the jury's response in the form of a special verdict that includes questions concerning damages.

urged in the trial court.[36] While AAA's motion for summary judgment asserted that Bullock had failed to state a claim on which relief can be granted, the bases of that assertion were grounds other than those adopted in the dissenting opinion.

The dissenting opinion, recognizing that oral assurances were held in *Toussaint* to be sufficient to require submitting the question whether there was a contract to a jury,[37] states that "not all oral assurances merit jury consideration."[38] It is suggested that the expressions relied on by Bullock were not "clear and unequivocal."[39] It is said that Bullock could not have reasonably relied on the oral assurances he alleged as a means of creating a contract of employment which was not termina-

[36] See n 7.

[37] *Post*, p 514; *Toussaint*, p 597.

[38] *Post*, p 515.

[39] *Id.*, p 7.

The dissenting opinion states:

> Furthermore, the rule of construction set forth in *Lynas*, which is preserved by *Toussaint*,[3] provides that a lifetime employment contract, even if agreed to, is generally construed as an indefinite hiring, terminable at the will of either party, in the absence of distinguishing features or special consideration in addition to the services to be rendered.
>
> [3] *Toussaint, supra*, at 596-597, 632. [*Post*, pp 517–518.]

Toussaint states, however:

> [A] provision of an employment contract providing that an employee shall not be discharged *except for cause* is legally enforceable *although the contract is not for a definite term—the term is "indefinite . . . ."* [*Id.*, p 598.]

No authority is cited by Blue Cross, Masco or our colleague for the proposition that where an employer has agreed that an employee hired for *an indefinite term shall not be discharged except for cause* the employer may, nevertheless, terminate the employment without cause. [*Id.*, p 609.]

ble at will unless there were distinguishing features or provisions or special consideration.[40]

Putting aside that there is a suggestion in one of the briefs that Bullock may have left the employ of another employer to accept employment with AAA, which, if true, might constitute a distinguishing feature or provision or special consideration, there is no rule of law requiring that a contract that need not be in writing be more specific or clear and less equivocal when it is oral than when it is in writing. Also putting aside that the disposition proposed in the dissenting opinion has not been explored at the trial level, AAA has not answered or denied the allegations that such a contract was entered into, there is no rule making unenforceable as a matter of law the contract alleged by Bullock.

While the dissenters may find it incredible that an employer would undertake to employ a person on the terms alleged by Bullock, issues of credibility are to be resolved by the trier of fact. In this connection, it is significant that a number of other former AAA employees have made similar allegations.[41]

The law implies terms of written and oral contracts. Bullock was not discharged because he was "inefficient, absent, tardy, slovenly, reckless, nonproductive" or "violent."[42] If AAA had sought to discharge him for one of those undesirable traits or for criminal activity other than thievery, the

[40] *Id.*, p 8.

[41] See *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619; 425 NW2d 480 (1988) (180 plaintiffs); *Farrell v Auto Club of Michigan*, 155 Mich App 378; 399 NW2d 531 (1986).

[42] *Post*, p 516. While Bullock was discharged for failing to meet AAA's production standards, that does not necessarily mean he was "nonproductive." It is Bullock's claim that he had been productive in creating a "book of business" and had a contractual right to continue to work on his "book of business."

question would then arise whether it might do so by reason of breach of an implied term of the contract of employment. A contract is not defective because the parties have not provided for contingencies that another person or a lawyer might have sought to address.

VII

In conclusion, the determinations of the circuit court and Court of Appeals that Bullock's state law claims are not preëmpted by federal labor law are affirmed. Also affirmed is the denial of AAA's motion for summary judgment. Bullock has sufficiently stated a claim on which relief can be granted. AAA has failed to demonstrate that it is entitled to judgment as a matter of law. Critical questions of fact remain undeveloped and should be developed at trial.

The cause is remanded to the circuit court.

GRIFFIN, J. (*concurring in part and dissenting in part*). I concur that plaintiff's claim is not preëmpted by the National Labor Relations Act. Since the majority concludes that remand is required, I join in the observation that to the extent that plaintiff's claim is based upon "legitimate expectations grounded in an employer's written policy statements,"[1] guidelines for resolution are provided by *In re Certified Question*, 432 Mich 438; — NW2d — (1989), also decided today. However, I disagree with the majority's conclusion that summary disposition would be premature on the basis of this record.

Plaintiff's claim of a termination-for-cause agreement hangs on his assertion that at time of hire

[1] *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 598; 292 NW2d 880 (1980).

he was orally promised "a lifetime job as long as he did not steal."

I conclude that it simply is not reasonable to construe such an assertion as an enforceable agreement to discharge only for cause. Subjective expectancies of continued employment do not constitute a termination-for-cause contract under *Toussaint,* and plaintiff's claim should fail as a matter of law.

I

It is still the general rule that employment for an indefinite term is presumed to be terminable at the will of either party.

> Contracts for permanent employment or for life have been construed by the courts on many occasions. In general it may be said that in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, such contracts are indefinite hirings, terminable at the will of either party. [*Lynas v Maxwell Farms,* 279 Mich 684, 687; 293 NW 315 (1937).]

See also anno: *Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge,* 33 ALR4th 120. The underlying rationale for this rule is that "[b]ecause the parties began with complete freedom, the court will *presume* that they intended to obligate themselves to a relationship at will." *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich 579, 600; 292 NW2d 880 (1980).[2] (Emphasis added.)

[2] Contracts at will are not the exception, but the rule, perhaps for the following reason:

> The contract at will is also a sensible private adaptation to

In Michigan, however, this general rule has been in danger of being swallowed up by the "narrow exception" carved out and announced by this Court in *Toussaint*. In that case the Court held:

> (1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite," and
>
> (2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements. [*Id.* at 598.]

The *Toussaint* decision neither vitiated the employment-at- will presumption nor did it create new or special rights. As explained in *Valentine v General American Credit, Inc*, 420 Mich 256, 258-259; 362 NW2d 628 (1984),

> *Toussaint* makes employment contracts which provide that an employee will not be dismissed except for cause enforceable in the same manner as other contracts. It did not recognize employment as a fundamental right or create a new "special" right. The *only* right held in *Toussaint* to

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the problem of imperfect information over time. In sharp contrast to the purchase of standard goods, an inspection of the job before acceptance is far less likely to guarantee its quality thereafter. The future is not clearly known. More important, employees, like employers, *know what they do not know*. They are not faced with a bolt from the blue, with an "unknown unknown." Rather they face a known unknown for which they can plan. The at-will contract is an essential part of that planning because it allows both sides to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information. [Epstein, *In defense of the contract at will*, 51 U Chi L R 947, 969 (1984).]

be enforceable was the right that arose out of the promise not to terminate except for cause.

Employers and employees remain free to provide, or not to provide, for job security. Absent a contractual provision for job security, either the employer or the employee may ordinarily terminate an employment contract at any time for any, or no, reason. The obligation that gave rise to this action is based on the agreement of the parties; it is not an obligation imposed on the employer by law. [Emphasis added.]

At one point the *Toussaint* Court emphasized the limits of its ruling:

> We hold *only* that an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract. [*Toussaint, supra,* at 610. Emphasis supplied.]

However, it cannot be denied that *Toussaint* pushed heavily against and through the boundaries of employment contract law with such language as:

> It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."
>
> • • •
>
> We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, although the statement of policy is signed by

> neither party, can be unilaterally amended by the employer without notice to the employee, and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in preemployment interviews and the employee does not learn of its existence until after his hiring. [*Id.*, pp 613, 614-615.]

When mutual assent is replaced by the "expectations" of one party as the measure of contract viability, an invitation to litigate is heralded, loud and clear. We need look only at the stampede to the courts which has followed in the wake of *Toussaint* to realize, nine years later, that some lines of reasonable limitation must be drawn. A reasonable limit was recognized today in *In re Certified Question* with the holding that a termination-for- cause policy set forth in a manual may be changed, even though the employer had not expressly reserved the right to do so.

The case at hand presents a further important opportunity to provide reasonable definition for what has come to be known as the *Toussaint* doctrine. Plaintiff claims to have an employment contract for the rest of his life, on the basis of an oral statement allegedly made at hiring that he would "have a lifetime job as long as he did not steal." Plaintiff contends that a jury should now be allowed to decide whether such a purported assurance gave rise to an enforceable contract terminable only for the single cause of thievery.

To be sure, in some situations lower courts and federal courts have held that rather general statements may go to the jury as the basis of a termination-for-cause contract. See, e.g., *Cowdrey v A T Transport*, 141 Mich App 617; 367 NW2d 433 (1985) (the employee testified that he was promised that he "would never have to worry" as long as he

did his job); *Hetes v Schefman & Miller Law Office*, 152 Mich App 117, 119; 393 NW2d 577 (1986) (the employee would "[have] a job as long as [she] did a good job"); *Walker v Consumers Power Co*, 824 F2d 499, 503 (CA 6, 1987) (the employer promised that the employee would not be fired as long as he "performed adequately" and "did a good performance on [his] job"); and *Ritchie v Michigan Consolidated Gas Co*, 163 Mich App 358; 413 NW2d 796 (1987).

However, other courts have held, sensibly, that not all oral assurances merit jury consideration. In *Broussard v Caci, Inc*, 780 F2d 162, 163 (CA 1, 1986), the court distinguished between "puffery and promise":

> Employment negotiations resulting in employment are by definition conducted in an atmosphere of optimism and mutual hope. The air is redolent with expectation of duration on the part of the employee and of satisfactory performance by the employer. But to equate general expressions of hope for a long relationship with an express promise to discharge only for good cause would effectively eliminate [the rule] . . . that contracts for indefinite employment are, without more, terminable at will.

Yet another court has made this distinction:

> Since *Toussaint*, the Court has been faced with a number of cases where the plaintiff has claimed a *Toussaint* contractual obligation arising out of the employer's hiring agent telling plaintiff at the time of employment that plaintiff could be employed "as long as he did the job" or similar expressions such as "as long as there is work to do," "as long as your work is satisfactory," "as long as you want," etc. When you examine these statements, each, standing alone, simply does not

> constitute a contract or agreement with any specific duration. Each was clearly within the policy of the *Lynas* case where an employment agreement for an indefinite term such as each of these was held to be an employment at will. After all *Lynas* as well as reality compels recognition of the fact that neither party to the beginning of an employment relationship expects it to be unsatisfactory, and both hope it will have a significant duration. This hope and noncontractual wish is expressed in terms of language such as "as long as you do the job." Hence, the *Toussaint* exception to *Lynas* must mean more than merely this language. While it is true that as the economy and society change, we can expect employment durational rules will be altered. That was probably the basis for the specific recognition in *Toussaint* that the employer will be held accountable for allowing a hiree to *reasonably* believe that there was a *specific* durational term to the employment; but it must be based on more than the expression of an optimistic hope of a long relationship. [*Carpenter v American Excelsior Co,* 650 F Supp 933, 936, n 6 (ED Mich, 1987).]

Such an admonition is warranted. Caution should be exercised in judging the viability of a breach of contract action based solely on an alleged oral representation recalled with remarkable specificity long years after the time of hiring.

The present case presents an intriguing example. Plaintiff claims a "lifetime job . . . as long as he did not steal." If we take the employer at his word, this precatory phrase sets forth an inherently indefinite term of employment (a lifetime); yet it simultaneously provides for discharge only for a single cause (thievery). As plaintiff would have it, he could be inefficient, absent, tardy, slovenly, reckless, nonproductive and even violent —to mention only a few undesirable traits; however, he could not be terminated unless he com-

mitted the one cognizable cause for ending the relationship—stealing.

Surely, a modicum of realism and common sense is needed. An assurance such as that alleged in the instant case simply cannot be separated from the realities of the working world. It should be recognized that "lifetime" employment contracts are extraordinary and, being so, "must be expressed in clear and unequivocal terms before a court will conclude that an employer intended to enter into such a weighty obligation." *Chastain v Kelly-Springfield Tire Co,* 733 F2d 1479, 1484 (CA 11, 1984). See also *Naz Agency, Inc v US Fidelity & Guaranty Co,* 277 F2d 640, 641 (CA 6, 1960). Otherwise stated, "A casual remark made at a meeting, a phrase plucked out of context, is too fragile a base on which to rest such a heavy obligation inherent in such a contract." *Brown v Safeway Stores, Inc,* 190 F Supp 295, 299-300 (ED NY, 1960).

Whether or not Bullock carried a subjective expectancy that he would work for this employer for the rest of his life, it is difficult to believe that any reasonable person would rely on such an oral assurance as the basis of an interminable employment contract "as long as he did not steal." I would hold that the allegations put forth in the instant case are insufficient as a matter of law to provide the basis for an employment contract that is not terminable at will.

Furthermore, the rule of construction set forth in *Lynas,* which is preserved by *Toussaint,*[3] provides that a lifetime employment contract, even if agreed to, is generally construed as an indefinite hiring, terminable at the will of either party, in the absence of distinguishing features or special

[3] *Toussaint, supra* at 596-597, 632.

consideration in addition to the services to be rendered. I am compelled to disagree with a suggestion in the majority opinion that special consideration sufficient to satisfy *Lynas* might exist in the instant case. *Ante,* p 482, n 9. As I read the pleadings, plaintiff does not aver that any particular benefit inured to the defendant, or that any particular hardship was incurred by plaintiff, distinguishable from that expected from the normal performance of all commissioned salespersons.

Accordingly, in conformity with *Lynas,* the motion for summary disposition should have been granted.

II

Although the majority opinion appropriately focuses only upon plaintiff's claim of wrongful discharge, *Ante,* p 477, n 5, plaintiff's complaint includes claims that reach into other areas of the employment relationship. For example, he contends that he was orally assured at hiring that he "would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent commission for sales . . . ," and that "if he worked hard and built up his 'book of business,' he would be able to earn large sums of money . . . and could enjoy his later working years . . . ."

I address these ancillary claims for the purpose of explaining why they also fail as a matter of law, and to emphasize that the *Toussaint* rationale has been confined by this Court to claims of wrongful discharge.

Plaintiff began his employment with defendant in 1968. Ten years later, in 1978, defendant changed the method by which it compensated sales personnel, replacing the straight seven percent

commission with a "unit compensation plan," whereby sales representatives were paid commissions calculated as a specified dollar amount, rather than as a percentage of the insurance premiums. This change in the method of compensation applied across the board to all of AAA's commission sales representatives, and not just to plaintiff. Plaintiff continued to work for nearly four years thereafter, and was compensated under the new plan until he was terminated as a sales representative in 1982.

Plaintiff now complains that by modifying its method of compensation in 1978, and by instituting production standards in 1981, defendant breached an oral contract purportedly entered into when he was hired. Specifically, plaintiff alleges that defendant "breached said promises and changed its policies without advising Plaintiff when Plaintiff came into the employ of Defendant that Defendant was reserving the right to do so . . . ."

Of course, a promise to pay commissions on sales actually made is enforceable, even when the underlying agreement is for an indefinite duration. *Reed v Kurdziel,* 352 Mich 287, 295; 89 NW2d 479 (1958). Depending on the terms agreed upon, commissions on sales originally procured could continue to accrue even after an employee is terminated. Accordingly, plaintiff might have a valid claim concerning defendant's obligation to pay commissions accruing from the book of business established by the plaintiff *prior to defendant's change in the method of compensating its sale staff.* However, the assertions in plaintiff's complaint do not support a claim that defendant abrogated its managerial prerogatives to modify the method of compensating its sales personnel.

An employer's intentio[illegible] give up permanently

a right so fundamental as the ability to make changes in its method of compensation is not to be lightly inferred. In his complaint, plaintiff reveals that the assurances on which he relies were expressed in terms of a company policy "which had been in effect for many years." There was no express statement that the policy would continue for a fixed period of time or that the policy could not be changed in the future.

Furthermore, there is no basis for an inference that the compensation method in effect at hire would forever remain unchanged. On the contrary, the fact that policies set out in distributed manuals were later modified rebuts such an inference.

Since I would conclude under part I that plaintiff was an employee at will, it logically follows that the right of an employer to terminate the relationship "necessarily includes the right to insist upon changes in the compensation arrangements as a condition of continued employment." *Green v Edward J Bettinger Co*, 608 F Supp 35, 42 (ED Pa, 1984), aff'd 791 F2d 917 (1986), cert den 479 US 1069 (1987). Thus, an employee in a termination-at-will relationship, once informed of a change in compensation rates, can either accept the new rates or exercise his own right to terminate the relationship. *Hathaway v General Mills, Inc*, 711 SW2d 227 (Tex, 1986); *Facelli v Southeast Marketing Co*, 327 SE2d 338 (SC, 1985). If an employee continues to work with knowledge of the changes, he impliedly accepts the modification. *Hathaway, supra; Albrant v Sterling Furniture Co*, 85 Or App 272; 736 P2d 201 (1987).

Surely, where an employee continues to work under a revised compensation system for nearly

four years, as in the case at bar, acceptance by the employee should be implied as a matter of law.[4]

Furthermore, *In re Certified Question, supra,* decided today, supports the proposition that an employer may unilaterally make such a policy change although the right to do so has not been expressly reserved. If even a just-cause termination policy can be modified or revoked, surely policies of lesser import may also be changed.

It is noteworthy that during a period of more than nine years since *Toussaint,* its rationale has been confined by this Court to claims of wrongful discharge. The point was reiterated in *Valentine, supra,* p 258, where this Court stated: "[t]he only right held in *Toussaint* to be enforceable was the right that arose out of the promise not to terminate except for cause."

Our lower courts, whose experience with *Toussaint*-based claims is extensive, have shown understandable reluctance to extend *Toussaint* beyond wrongful discharge disputes. For example, see *Dyer v Dep't of State Police,* 119 Mich App 121; 326 NW2d 447 (1982) (rejecting the plaintiffs' claim that department policy and practice had given rise to a contractual right to nonduty use of state vehicles, on the basis that rights and duties of the parties relative to vehicle use were not regulated by implications), and *Engquist v Livingston Co,* 139 Mich App 280; 361 NW2d 794 (1984) (rejecting the plaintiff's claim that a fourteen-year history of step increases had given rise to a *Toussaint*-based entitlement to step increases).

Even if it can be said that policy considerations were sufficient to justify the *Toussaint* intervention to protect job security, it is difficult to imagine the scope of difficulties and mischief that would be

[4] Plaintiff does not contend that he was not fully compensated for services rendered.

encountered if *Toussaint* were to be extended beyond wrongful discharge into every facet of the employment relationship. Particularly in light of the enormous potential cost to the system that such an extension would entail, including damage to the delicate balance of the employee-employer relationship, I take this occasion to express the view that it would be prudent and wise to leave to the Legislature the public policy decision whether, or to what extent, *Toussaint* should be extended beyond wrongful discharge.

III

Defendant has argued in this Court that plaintiff's claim of lifetime employment based on an oral promise should be barred as in violation of the Michigan statute of frauds.[5] Because Bullock's assertion of a "lifetime contract" is exactly the sort of promise that courts should generally decline to enforce unless it is in writing, I feel compelled to make the following observations.

It is one of the curiosities of the common law that contracts for permanent or lifetime employment have been held to fall outside the scope of the statute of frauds. On its face the statute appears to require that promises contemplating long-term commitments, such as that alleged in the instant case, be validated by written evidence in order to be enforceable:

> In the following cases an agreement, contract or promise shall be void, unless that agreement, contract, or promise, or a note or memorandum thereof is in writing and signed by the party to be charged therewith, or by a person authorized by him:

[5] MCL 566.132; MSA 26.922. The majority declines to address this issue since it was not raised at the trial level. *Ante*, p 481, n 8.

> (a) *An agreement that, by its terms, is not to be performed within 1 year from the making thereof.* [MCL 566.132(a); MSA 26.922(a). Emphasis supplied.]

Since enactment of the original English statute in 1676,[6] however, courts have chafed under its restrictions.[7] The undisputed trend of authority has been to interpret the "one year" provision as applying only to contracts that have no possibility of being completed within a year, even if the parties to the contract in fact contemplated a longer period.[8] Michigan's case law has followed that trend by applying the nonstatutory "capable of performance" exception to the one-year provision of the statute of frauds.[9]

Significantly, the primary reason used to explain the result in the case of an oral contract for permanent or lifetime employment is that such contracts are terminable at will. See, for example, *Sax v Detroit, G H & M R Co,* 125 Mich 252, 255-256; 84 NW 314 (1900). This rationale was typified in *Adolph v Cookware Co of America,* 283 Mich 561, 568; 278 NW 687 (1938):

> Plaintiff's proofs, taken as true, showed a contract for permanent employment. Such a contract is for an indefinite period and, unless for a consid-

[6] 29 Car II, c 3. Comparisons between present time and the late seventeenth century should be made cautiously, if at all. Nevertheless, one scholar's observation about the conditions which gave rise to the statute is so strikingly familiar that it demands reflection: "Litigation indeed came close to a form of sanctioned aggression, and it was an aggressive age." Simpson, A History of the Common Law of Contract, p 599.

[7] Farnsworth, Contracts, § 6.1, p 373.

[8] Corbin, Contracts, § 446, pp 553-554.

[9] The earliest Michigan case to apply the "capable of performance" exception appears to be *Smalley v Mitchell,* 110 Mich 650, 652; 68 NW 978 (1896). See also *Toussaint, supra,* p 612, n 24, and the cases cited therein.

eration other than promise of services, the employment was terminable at the will of either party. *Lynas v Maxwell Farms*, 279 Mich 684, and cases there cited.

Prior to *Toussaint*, the implications of such an interpretation were not ominous. Although an employment contract for an indefinite period fell outside the statute of frauds, the well-established termination-at-will doctrine had the counter- balancing effect of providing protection from fraudulent allegations of oral promises.

It is not surprising that, faced with the problems of proof presented since *Toussaint* by erosion of the employment-at- will doctrine, some courts have begun to question the wisdom of exempting employment contracts from the requirement that they be in writing where it is clear that performance beyond a year is contemplated. See, for example, *Molder v Southwestern Bell Telephone Co*, 665 SW2d 175 (Tex App, 1983); *Evans v Floor Distribution Co*, 799 F2d 364 (CA 7, 1986); *Hodge v Evans Financial*, 262 US App DC 151, 163; 823 F2d 559 (1987) (MacKinnon, J., dissenting).

In Michigan, a trial court recently found that several wrongful discharge claims brought against the instant defendant, alleging promises virtually the same as Bullock's, were barred by the statute of frauds. However, the Court of Appeals reversed, relying on the "capable of performance" exception as expressed in *Adolph Cookware*, *supra*, p 568. *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619, 631; 425 NW2d 480 (1988).

In California, an appellate court has recognized that the statute of frauds issue can no longer be routinely avoided given recent developments in employment law:

> The traditional view is that such a contract could conceivably be performed within one year by termination of the employment agreement by one

party or the other. Since such an employment agreement has long been interpreted as being for an indefinite period, it is terminable at will by either party. . . .

Appellant alleges that respondent did not have the option of terminating him at will without good cause. . . .

Appellant cannot have it both ways. Either his employment relationship was a contract in which both parties had equal rights to terminate at will (in which case it was not in violation of the statute of frauds), or it was a contract where the employer did not have the right to terminate at will, and there was a reasonable expectation of employment for more than one year (in which case the statute of frauds does apply, barring this action.) [*Newfield v Ins Co of the West*, 156 Cal App 3d 440, 446; 203 Cal Rptr 9 (1984). Emphasis supplied.][10]

The statute of frauds "reflects a judgment that parol evidence of certain types of agreements is so inherently suspect that it should not even be presented to a jury, an institution otherwise generally considered capable of distinguishing fact from invention." *Thompson v Stuckey*, 300 SE2d 295, 298 (W Va, 1983).

The oral promise of a lifetime job alleged in this case by Bullock certainly falls within that category. As I see it, the time has come to revisit this antiquated interpretation of the statute of frauds which makes no sense in the post-*Toussaint* era. If this Court does not do so, it is hoped the Legislature will see the wisdom of making needed adjustments of the statute.

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[10] The California Supreme Court in *Foley v Interactive Data Corp*, 47 Cal 3d 654; 254 Cal Rptr 211; 765 P2d 373 (1988), recently rejected the reasoning of *Newfield* and instead deferred to the majority approach by applying the "capable of performance" approach to the statute of frauds.

I would reverse the decision of the Court of Appeals.

RILEY, C.J., concurred with GRIFFIN, J.

Appendix B

ORDER

Entered: September 8, 1989

Rehearing No. 218

78027(104)(105)

WILLIAM J. BULLOCK,
Plaintiff-Appellee,

v

AUTOMOBILE CLUB OF MICHIGAN a/k/a AAA and AUTO CLUB INSURANCE ASSOCIATION, a Michigan corporation,
Defendants-Appellants.

SC 78027
CoA 71773
LC 82-226-217-CK

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

The motion by the Michigan Manufacturers Association for leave to file a brief *amicus curiae* is considered and it is GRANTED.

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

(s) Corbin R. Davis
Clerk

September 8, 1989

Appendix C

MICHIGAN SUPREME COURT

BULLOCK v AUTOMOBILE CLUB OF MICHIGAN

432 Mich 472 (1989)

[*Editor's Note:* Page 499, first full paragraph, of the opinion filed by Justice LEVIN in this case has been amended to read as follows:]

When a collective bargaining agreement expires and the parties are unable to agree on the terms of a new agreement, an employer may implement its final offer after impasse. In the instant case, however, no collective bargaining agreement was ever agreed upon and the union was decertified, albeit after Bullock was discharged. Where no agreement is reached, enforcement pursuant to state law of preexisting state law contract rights and other state law claims does not "frustrate any policy of the federal labor laws." *Belknap*, *supra*, p 512.

BULLOCK v AUTOMOBILE CLUB OF MICHIGAN

Docket No. 71773. Submitted November 14, 1984, at Detroit.—Decided November 4, 1985. Leave to appeal applied for.

Plaintiff, William J. Bullock, was hired in 1968 by defendants, the Automobile Club of Michigan and Auto Club Insurance Association, as a commission salesperson. In 1978 a union was certified as bargaining representative for the defendant's commission salespersons. Negotiations were conducted in an effort to reach a collective bargaining agreement but ended in an impasse. At that time the defendants implemented minimum production standards which had been included in the defendants' last offer to the union. Later negotiations between the union and the defendants were fruitless and no collective bargaining agreement was ever reached. The union was eventually decertified. Plaintiff was notified that his employment as a commission salesperson would be terminated because of his failure to meet the minimum production standards. He was offered and accepted a lower-paying position. Plaintiff brought an action alleging that his demotion, as well as a change in the method of compensation of commission sales representatives, violated a preexisting employment contract. Plaintiff later amended his complaint to include claims of age discrimination, unjust enrichment, conversion and negligent evaluation. Defendants filed a motion for accelerated or, in the alternative, summary judgment. The Wayne Circuit Court, Michael L. Stacey, J., denied defendants' motion, and defendants appealed by leave granted. *Held:*

1. In the absence of a written employment contract expressing the mutual intent of the parties, the questions of whether a contract was formed, what the terms of the contract are, and

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REFERENCES FOR POINTS IN HEADNOTES

[1-5] Am Jur 2d, Master and Servant §§ 14-70.

Employee's arbitrary dismissal as breach of employment contract terminable at will. 62 ALR3d 271.

[5] Am Jur 2d, Labor and Labor Relations §§ 1920 *et seq.*

Breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract. 29 ALR3d 688.

whether the terms have been validly modified are questions for the trier of fact.

2. The question of whether the defendants' past policies or practices are terms of the employment contract, which bears directly on the question of whether the employer was free to change the policies or practices unilaterally, is a question of fact. Although the trial court relied upon the wrong reasons, it reached the right result on this issue, and its decision will not be reversed.

3. Plaintiff's preexisting contract rights were not superseded by the results of the collective bargaining because no collective bargaining agreement was ever reached.

4. Jurisdiction of the action was properly in the state court.

Affirmed.

1. LABOR RELATIONS — EMPLOYMENT CONTRACTS — DISCHARGE FROM EMPLOYMENT.

A provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable even though the contract is for an indefinite term; such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

2. LABOR RELATIONS — PERSONNEL POLICIES.

An employee has a right to have stated personnel policies and practices of the employer applied to his own employment, even though there were no preemployment negotiations, no meeting of the minds on the subject, and no knowledge on the part of the employee as to the particularities of the policies or that the employer is free to change them unilaterally.

3. LABOR RELATIONS — EMPLOYMENT CONTRACTS.

A contract of employment is the result of a voluntary act conveying the mutual intent of the parties to be bound by its terms and provisions; where there is no written evidence of mutual intention, the questions of whether the contract was formed, what its terms are, and whether the terms have been validly modified are questions for the trier of fact.

4. LABOR RELATIONS — PERSONNEL POLICIES — EMPLOYMENT CONTRACTS.

An employee's expectations of the continuation of the employer's personnel policy cannot be considered reasonable or legitimate where the employer has regularly changed its policy unilater-

ally; the question of whether there was a reasonable and legitimate expectation in the employee that the employer's policy or practice was a term of the employment contract, which bears directly on the question of whether the employer was free to change the policy or practice unilaterally, is a question for the trier of fact.

5. LABOR RELATIONS — EMPLOYMENT CONTRACTS — COLLECTIVE BARGAINING — ACTIONS.

The contract rights of individual employees under their employment contracts are not extinguished during negotiations for a collective-bargaining agreement pursuant to the National Labor Relations Act until the parties have entered into a valid agreement; until such an agreement is entered into, an employee may pursue an action in a state court for breach of the employment contract.

Law Offices of John W. Mason, P.C. (by *John W. Mason* and *Mary Taylor Zick*), for plaintiff.

Finkel, Whitefield & Selik (by *Robert J. Finkel*), and *Kalvin M. Grove* and *Steven L. Gillman*, for defendants.

Before: HOOD, P.J., and BRONSON and R. L. TAHVONEN,* JJ.

PER CURIAM. Defendants appeal by leave granted from an order of the Wayne County Circuit Court denying defendants' motion for accelerated and/or summary judgment.

In May of 1968, plaintiff was hired by defendants as a commission salesperson. At that time, the sales representatives were not members of any union. On February 7, 1978, the Michigan Sales Association (union) was certified as the exclusive bargaining representative for defendants' commission salesperson.

Starting in October, 1980, the company and the union met at least 28 times in an effort to negoti-

* Circuit judge, sitting on the Court of Appeals by assignment.

ate a collective bargaining agreement. The primary dispute throughout the negotiations centered around the implementation of mandatory production standards. Defendants insisted that the collective bargaining agreement contain scheduled minimum production standards, which the union vigorously resisted.

Defendants submitted a final offer to the union in July, 1981, which included the disputed minimum production standards. At a general membership meeting held on August 5, 1981, the union voted to reject the company's final offer, resulting in an impasse.

On September 1, 1981, defendants implemented the production standards which were in its final offer. Under these standards, if a sales representative failed to meet a predetermined production standard during any particular month, the representative received an oral warning and, in subsequent months, a written warning, probation, and termination or demotion if the representative failed to fulfill the standards for four successive months.

On October 8, 1981, defendants and the union resumed negotiations and held ten additional negotiating sessions without reaching an agreement. Negotiations broke off on January 4, 1982, reconvened on February 24, 1982, and no further meetings were held after March 18, 1982. In October, 1982, the union was decertified.

In the meantime, on February 19, 1982, defendants notified plaintiff that his employment as a commission sales representative would be terminated as of February 28, 1982, for failure to fulfill the requisite production standard. Defendants offered and plaintiff accepted a lower paying position as a salaried member advisor.

Subsequently, on July, 1982, plaintiff filed the

action at bar in Wayne County Circuit Court alleging breach of an employment contract, relying on *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980), *reh den* 409 Mich 1101 (1980). According to plaintiff, when he was hired in 1968, defendants made certain promises and representations to him, including: (1) that he would have a lifetime job as long as he did not steal; (2) that he would be employed as a sales representative and earn a 7% commission for his sales, a method of compensation which had been in effect for many years; and (3) if he worked hard to build up his "book of business", which consists of accumulated policies and memberships that a commission salesperson builds up over the years, he could enjoy his later working years by realizing those commissions.

According to plaintiff, his demotion, which was allegedly predicated on his failure to meet the production standards, and the implementation of a unit compensation program in place of the commission compensation, violated this preexisting contract.

On August 10, 1982, defendants filed a petition for removal to federal court on the basis that plaintiff's cause of action was governed exclusively by the National Labor Relations Act and depended entirely on federal law. Once in federal court, defendants filed a motion to dismiss alleging that the National Labor Relations Board (NLRB) had exclusive jurisdiction over plaintiff's claim and that the United States District Court lacked subject matter jurisdiction. Plaintiff filed a motion to remand to the circuit court on August 30, 1982, pointing out the inconsistent positions taken by defendants in circuit court and in federal court. Federal District Court Judge Anna Diggs Taylor heard oral arguments on October 25, 1982, and

remanded the case to Wayne County Circuit Court on November 1, 1982.

In Wayne County Circuit Court, on November 16, 1982, defendants filed a motion for accelerated or, in the alternative, summary judgment. On February 16, 1983, before the hearing on this motion, plaintiff filed a first amended complaint which added counts for age discrimination, unjust enrichment, conversion and negligent evaluation. Two days later, the trial court heard the parties' arguments concerning accelerated and summary judgment and denied defendants' motion, from which defendants appeal.

Defendants first argue that the trial court erred in refusing to dismiss plaintiff's action because *Toussaint* expressly permits an employer to unilaterally change its employment policies so long as the employees are notified of the changes and the new policies are applied fairly, consistently and uniformly. We disagree that this is the holding of *Toussaint*.

For their argument, defendants rely on the following language in *Toussaint:*

> "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; *nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally.* It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices,

they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation 'instinct with an obligation'.

• • •

"We hold that employer statements of policy, such as the Blue Cross Supervisory Manual and Guidelines, can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, *and, hence, although the statement of policy is signed by neither party, can be unilaterally amended by the employer without notice to the employee,* and contains no reference to a specific employee, his job description or compensation, and although no reference was made to the policy statement in pre-employment interviews and the employee does not learn of its existence until after his hiring." *Id.*, pp 613-615. (Emphasis added, footnotes omitted.)

This holding must be construed in light of the factual context of *Toussaint* in order to be fairly understood.

Charles Toussaint was employed in a middle management position with Blue Cross. After he was employed for five years and discharged, he commenced an action against his former employer claiming that the discharge violated his employment agreement which permitted discharge only for cause. This action resulted in a jury verdict rendered for Toussaint in the amount of $72,835.52.

On appeal this Court reversed the jury verdict for Toussaint holding that "a contract for permanent employment or employment for life is a contract for an indefinite period and terminable at the will of either party" and "*cannot* be made other than terminable at will by a provision that states that an employee will not be discharged except for cause". (Emphasis supplied.) *Toussaint* v

Blue Cross & Blue Shield of Michigan, 79 Mich App 429, 434-435; 262 NW2d 848 (1977).

The questions thus presented to the Supreme Court were whether this Court had correctly stated the law and, if not, whether there was sufficient evidence presented to make submissible to the jury the question of whether there was an agreement for a contract of employment terminable only for cause. The Supreme Court resolved the first question and reversed the decision of this Court, holding that:

> "1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is 'indefinite,' and
>
> "2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statement". 408 Mich 598.

As to the second question, the Supreme Court held that in Toussaint's case there was sufficient evidence of an express agreement to justify submission to the jury *and* that "[a] jury could also find for Toussaint based on legitimate expectations grounded in his employer's written policy statements set in the manual of personnel policies". *Id.*, p 599. It is to this latter conclusion of the Supreme Court that the two passages cited by defendant speak.

In reaching its conclusion, the Court focused on whether the evidence could support a finding that Toussaint gave consideration for his employer's promise in the employee manual to terminate its employees only for just cause. It recognized that in setting forth personnel policies and procedures the employer contemplated mutual adherence to the

policy, thereby deriving benefits from a cooperative and loyal work force. *Id.*, pp 613-615. These benefits were deemed sufficient consideration to make the just cause policy in the manual binding on the employer. *Id.*, In the passages cited by defendants, Justice LEVIN and the majority were concerned that employers could implement such company policies but then apply them arbitrarily. To avoid sanctioning such capricious action, the Supreme Court held, and rightfully so, that once an employer chooses "to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee" the employer has created a "situation 'instinct with an obligation' ". *Id.*, p 613. This is so even where there are no preemployment negotiations, no meeting of the minds on the subject, and no knowlege on the part of the employee as to the particularities of the policies or that the employer is free to unilaterally change them. These conditions are not prerequisites to the formation of an employee's right to have stated personnel policies and practices of the employer applied to his own employment. Compare, *Rasch v East Jordan*, 141 Mich App 336, 344-345; 367 NW2d 856 (1985).

This is the narrow holding of *Toussaint*. *Toussaint* did not abrogate the traditional notions of contract law in general nor did it directly address the issue presented in the instant case.

The contract of employment still remains the result of a voluntary act, conveying the mutual intent of the parties to be bound by its terms and provisions. See *McDonald v Boeing*, 43 Mich 394; 5 NW 439 (1880). Further, where there is no written evidence of mutual intention, whether the contract

was formed, what its terms are, and whether the terms have been validly modified continue to be questions for the trier of fact.

In rejecting defendants' construction of *Toussaint* the trial court held "while it is true that an employer is not bound by stated policies of performance, he must make known to the employees that these policies may change in the future. It is not enough that the employer makes the actual change of policy known to those working pursuant to it; it *must* also make sure that they knew these policies can be changed. This results in an issue of fact whether there was expectation of a continued policy in practice or knowledge that such policies could and would be changed." (Emphasis added.)

We have already explained why the trial court was correct in rejecting defendants' construction of *Toussaint*. However, we do not find the trial court's reasoning to be based on a correct reading of *Toussaint*. The *Toussaint* Court wrote:

> "Employers *can* make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force." 408 Mich 619 (Emphasis added.)

There is a fundamental difference between the words "must" and "can". In using the word "can" the *Toussaint* Court was advising the employer that it "can" protect itself against a reasonable expectation arising in an employee that a policy or practice is part of the employment contract by informing the employee that its policy can be changed at any time. The Supreme Court does not state, as did the trial court, that an employer *must* give such notice or otherwise be barred from unilaterally effecting policy changes in the future. To

the contrary, such notice or knowledge can be construed from the circumstances surrounding the employment. For instance, this Court has held that where an employer has unilaterally changed its personnel policy plans regularly, the plans cannot give rise to rights enforceable in contract because the expectations of the employee cannot be considered reasonable or legitimate. *Engquist v Livingston County,* 139 Mich App 280, 283-284; 361 NW2d 794 (1984).

However, we agree that the question of whether there was a legitimate and reasonable expectation in the employee that an employer's policy or practice is a term of the employment contract which bears directly upon the question of whether the employer is free to unilaterally change the policy or practice is for the trier of fact. Therefore, we will not disturb the decision of the trial court although it was reached through incorrect reasoning. *DeWitt Twp v Clinton County,* 113 Mich App 709, 713; 319 NW2d 2 (1982).

Accordingly, we hold that whether the terms of plaintiff's employment contract included provisions (1) that he would have a lifetime job as long as he did not steal, (2) that he would be employed as a sales representative and compensated by commissions on his sales throughout his employment, and (3) that he could enjoy his later working years by realizing those commissions are questions of fact which must be decided by the trier of fact. Once the terms of plaintiff's employment contract are determined, then the ultimate issue of whether defendants breached the employment contract with plaintiff by implementing the new production standards and demoting plaintiff pursuant to those standards can be determined by the trier of fact.

Defendants next argue that plaintiff's complaint should be dismissed because an employer's unilat-

eral implementation of its final offer after reaching a bona fide impasse in the negotiation of an initial collective bargaining agreement has the same effect as reaching a collective bargaining agreement and supersedes all prior individual employment contracts. According to defendants, this occurred in the case at bar and requires that federal law must govern plaintiff's case. Therefore, plaintiff's *Toussaint* claims must be dismissed as *Toussaint* was never intended to apply in the context of union negotiations.

Reduced to its basic meaning, collective bargaining is no more than negotiating. It only brings about contract rights, it does not consist of them. As in a one-on-one agreement where there is no meeting of the minds, collective bargaining which does not bear an agreement is no more than a process without a result. As such, bargaining to impasse on the formation of a new agreement creates nothing that could supersede preexisting contract rights.

Since no collective bargaining agreement was ever reached in this case, plaintiff's preexisting contract rights are still in effect. Redress for any alleged breach of those rights is properly brought in state courts. The trial court, therefore, properly denied summary judgment on this ground.

Defendants further argue that even if plaintiff's individual contract survived the selection of the union, the terms of the contract were superseded by the terms validly implemented after an impasse was reached in collective bargaining. Defendants claim, therefore, that state jurisdiction is preempted, and that the National Labor Relations Board has exclusive jurisdiction. This argument was rejected by this Court in a companion case

against defendants with which we agree. *Roberts v Automobile Club of Michigan*, 138 Mich App 488; 360 NW2d 224 (1984).

Affirmed.

Appendix E

STATE OF MICHIGAN
CIRCUIT COURT OF THE
COUNTY OF WAYNE

WILLIAM J. BULLOCK,
Plaintiff,

v. 82-226-217 CK

AUTOMOBILE CLUB OF MICHIGAN, *et al.*,
Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR ACCELERATED OR SUMMARY JUDGMENT AND CERTIFYING THE ISSUES FOR INTERLOCUTORY APPEAL

At a session of said Court, held in the City-County Building, in the City of Detroit, on the 13th day of April, 1983.

PRESENT: Honorable Michael L. Stacey,
Circuit Judge

This matter having come on for hearing on defendants' Motion for Accelerated Judgment, or in the Alternative for Summary Judgment, and the parties having filed briefs and argued orally regarding said motion, and the Court being fully advised in the premises;

NOW, THEREFORE for the reasons set forth in the Court's February 18 oral opinion, the Motion for Accelerated, or in the Alternative Summary Judgment, is denied. It is further ordered that pursuant to General Court Rule 806.3 the issues discussed in the Court's February 18 Opinion are certified as involving controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal

Appendix E

from this order may materially advance the ultimate termination of the litigation.

(s) MICHAEL L. STACEY—*JUDGE*
Third Judicial Circuit

Approved as to Form:
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Attorney for Plaintiff

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, United States Constitution, Article VI, Clause 2, provides:

> This constitution, and the laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

National Labor Relation Act, Sections 7, 8(a), 8(d), 9(a), and 10(a), 29 U.S.C. §§157, 158(a), 158(d), 159(a), 160(a), provide in relevant part:

> Section 7 [Rights of employees]. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities * * *.
>
> Section 8(a) [Unfair labor practices by employer]. It shall be an unfair labor practice for an employer —
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > * * *
> >
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *;
> >
> > * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Appendix F

Section 8(d) [Obligation to bargain collectively]. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 9(a) [Exclusive representatives; employees' adjustment of grievances directly with employer]. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10(a) [Powers of Board generally]. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

Appendix G

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIAM J. BULLOCK,
Plaintiff

Case No. 82 226217 CK

vs.

AUTOMOBILE CLUB OF MICHIGAN, A/K/A AAA, and AUTO CLUB INSURANCE ASSN., a Michigan corporation,
Defendant.

COMPLAINT AND DEMAND FOR TRIAL BY JURY

Comes now Plaintiff herein by and through his attorneys, LAW OFFICES JOHN W. MASON, P.C., and complains against Defendant, AUTOMOBILE CLUB OF MICHIGAN, also known as AAA and AUTO CLUB INSURANCE CO., saying as follows:

1. That Plaintiff is a resident of the County of Wayne, State of Michigan, and Defendant is a Michigan corporation with its principal place of business in the City of Dearborn, County of Wayne, State of Michigan.

2. That at all times pertinent hereto Plaintiff was an employee of Defendant, acting in the capacity of commission salesman.

3. That when Plaintiff entered the employ of Defendant he entered the employ of Defendant based upon the following promises:

a) That he would have a lifetime job as long as he did not steal;

b) that he would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent

commission for sales which had been in effect for many years;

c) that if he worked hard and built up his "book of business," he would be able to earn large sums of money;

d) that if he worked hard and built up his "book of business," he could enjoy his later working years with Defendant by realizing commissions from the "book of business," which "book of business" is the accumulated memberships and policies which a commission salesman builds up over the years.

4. That for many years, Defendant worked very hard and built up his "book of business" in reliance upon the promises of Defendant and in order to enable him to enjoy the benefits of a large salary due to his individual efforts in developing his business.

5. That notwithstanding the many promises of the Defendant in this action, Defendant breached said promises and changed its policies without advising Plaintiff when Plaintiff came into the employ of Defendant that Defendant was reserving the right to do so; changing its policies as follows:

a) Eliminating commissions as a basis of compensation for sales persons;

b) establishing a "unit compensation" program whereby the commission salesmen would only get a certain amount of money per membership or policy rather than a percentage commission as had been promised to the commission salesmen whey [sic] they entered the employ of Defendant;

c) establishing non-competitive rates for its product;

d) imposing unreasonable quotas upon the commission salesmen which, taken together with the non-competitive rates for Defendant's policies, made it impossible for the commission salesmen to achieve their quotas; and,

e) coercing Plaintiff and other persons similarly situated out of their employment thereby breaching the implied contract between Plaintiff and Defendant.

6. That these changes of policy by Defendant resulted in Plaintiff and other persons similarly situated being unable to meet the artificially designated quotas resulting in the Defendant imposing disciplinary action upon Plaintiff and other persons similarly situated and ultimately discharging them or reducing them in status to Member Advisor and thereby eliminating the high cost to the company of having commission salesmen on its staff and thereby unjustly enriching the company in that the company was able to take over Plaintiff's "book of business" which Plaintiff had built up over the years, causing Plaintiff to lose the substantial earning level which Plaintiff had established.

7. That the actions of Defendant herein were made in bad faith.

8. That the ultimate purpose of the actions of Defendant was not to increase the productivity of Defendant's sales persons, but to eliminate commission sales persons from the staff of Defendant and replace them with lower paid salaried personnel.

9. That upon Plaintiff entering the employ of Defendant, Plaintiff formed reasonable expectations based upon Defendant's policy statements that Defendant would honor its promises to Plaintiff and that Plaintiff would be able to earn a substantial living on the basis of hard work in building a large "book of business."

10. That as a consequence of the breach of the express oral promises of Defendant, Plaintiff has lost a job which was guaranteed to be a lifetime job in which he was told he would be able to earn large commissions.

11. That the actions of Defendant constitute a breach of contract with Plaintiff, whereby Plaintiff has suffered damages.

12. That the actions of Defendant further unjustly enriched Defendant to the detriment of Plaintiff.

WHEREFORE, Plaintiff prays for judgment against Defendant in the amount of $10,000,000.00 plus costs and attorneys' fees.

LAW OFFICES JOHN W. MASON, P.C.
By: JOHN W. MASON P-17182
Attorney for Plaintiff
521 Parklane Towers, West
Dearborn, MI 48126
336-2030

DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that Plaintiff herein demands a trial by jury of the above entitled action.

LAW OFFICES JOHN W. MASON, P.C.
By: JOHN W. MASON P-17182
Attorney for Plaintiff
521 Parklane Towers, West
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Appendix H

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIAM J. BULLOCK,
Plaintiff,

vs.

Case No. 82 226217 CK

AUTOMOBILE CLUB OF MICHIGAN, a/k/a
AAA, and Auto Club Insurance Assn.,
a Michigan corporation,
Defendants.

FIRST AMENDED COMPLAINT AND DEMAND FOR TRIAL BY JURY

Comes now Plaintiff herein by and through his attorneys, LAW OFFICES JOHN W. MASON, P.C., and complains against Defendant, AUTOMOBILE CLUB OF MICHIGAN, also known as AAA and AUTO CLUB INSURANCE CO., saying as follows:

COMMON ALLEGATIONS

1. That Plaintiff is a resident of the County of Wayne, State of Michigan, and Defendant is a Michigan corporation with its principal place of business in the City of Dearborn, County of Wayne, State of Michigan.

2. That at all times pertinent hereto Plaintiff was an employee of Defendant, acting in the capacity of commission salesman.

3. That when Plaintiff entered the employ of Defendant he entered the employ of Defendant based upon the following promises:

a) That he would have a lifetime job as long as he did not steal;

b) that he would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent commission for sales which had been in effect for many years;

c) that if he worked hard and built up his "book of business," he would be able to earn large sums of money;

d) that if he worked hard an [sic] built up his "book of business," he could enjoy his later working years with Defendant by realizing commissions from the "book of business," which "book of business" is the accumulated memberships and policies which a commission salesman builds up over the years.

4. That for many years, Plaintiff worked very hard and built up his "book of buisness" in reliance upon the promises of Defendant and in order to enable him to enjoy the benefits of a large salary due to his individual efforts in developing his business.

COUNT I — BREACH OF CONTRACT

5. That notwithstanding the many promises of the Defendant in this action, Defendant breached said promises and changed its policies without advising Plaintiff when Plaintiff came into the employ of Defendant that Defendant was reserving the right to do so; changing its policies as follows:

a) Eliminating commissions as a basis of compensation for sales persons;

b) establishing a "unit compensation" program whereby the commission salesmen would only get a certain amount of money per membership or policy rather than a percentage commission as had been promised to the commission salesmen when they entered the employ of Defendant;

c) establishing non-competitive rates for its product;

d) coercing Plaintiff and other persons similarly situated out of their employment thereby breaching the implied contract between Plaintiff and Defendant.

6. That these changes of policy by Defendant resulted in Plaintiff and other persons similarly situated being discharged or reduced in status to Member Advisor, therby [sic] eliminating the high cost to the company of having commission salesmen on its staff.

7. That upon Plaintiff entering the employ of Defendant, Plaintiff formed reasonable expectations based upon Defendant's policy statements that Defendant would honor its promises to Plaintiff and that Plaintiff would be able to earn a substantial living on the basis of hard work in building a large "book of business."

8. That as a consequence of the breach of the express oral promises of Defendant, Plaintiff has lost a job which was guaranteed to be a lifetime job in which he was told he would be able to earn large commissions.

9. That the actions of Defendant constitute a breach of contract with Plaintiff, whereby Plaintiff has suffered damages.

COUNT II — UNJUST ENRICHMENT

10. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

11. That at all times pertinent hereto, Plaintiff has built up a valuable "book of business" through his efforts.

12. That when Defendant stripped Plaintiff of his "book of business" it caused damage to the Plaintiff and unjustly enriched the Defendant in that the Defendant was able to take over Plaintiff's "book of business" without paying compensation to Plaintiff that it had agreed to.

Appendix H

COUNT III — CONVERSION

13. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

14. That at all times pertinent hereto that Plaintiff had a property right in his "book of business", which property right was taken from him by the wrongful acts of Defendant which constitute conversion.

COUNT IV — AGE DISCRIMINATION

15. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

16. That the Plaintiff is a member of the class of employees offered protection under the Elliot-Larson Civil Rights Act, MCLA 37.2201 et seq; MSA 3.548(101) et seq, and the Fair Employment Practices Act.

17. That the Defendant in this action contrived a scheme to eliminate senior and older commission sales representatives from the staff through imposition of unrealistic production quotas, not taking into consideration the fact that the senior commission salesmen had to spend disproportionate amounts of their time in servicing existing accounts, rather than seeking out new business.

18. That the imposition of the minimum production quota was not for the purpose of increasing the productivity of Defendant's salespersons, but to replace Defendant's commissioned salespersons with younger, lower paid salaried personnel.

19. That the actions of the Defendant violated the rights of Plaintiff under the aforedescribed Elliot-Larson Civil Rights Act, MCLA 37.2201 et seq; MSA 3.548(101) et seq.

COUNT V — NEGLIGENT EVALUATION

20. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

21. That at all times pertinent hereto Defendant had a duty to provide reasonable and accurate performance appraisals to Plaintiff, concerning Plaintiff's performance of his duties.

22. That the Defendant, despite said duty, failed and refused to perform accurate and reasonable and fair performance evaluations of Plaintiff.

23. That the actions of the Defendant in this action constitute negligence.

COMMON ALLEGATIONS

24. That the actions of the Defendant herein have damaged Plaintff and caused him to lose substantial compensation, including commissions, future pensions, fringe benefits and general damages.

WHEREFORE, Plaintiff prays for judgment against Defendant in the amount of Ten Million ($10,000,000.00) Dollars in actual and exemplary damages, plus costs and attorneys' fees.

LAW OFFICES JOHN W. MASON, P.C.
By: (s) JOHN W. MASON P-17182
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336-2030

DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that Plaintiff herein demands a trial by jury of the above entitled action.

LAW OFFICES JOHN W. MASON, P.C.
By: (s) JOHN W. MASON P-17182
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336-2030

Appendix I

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

WILLIAM BULLOCK,
Plaintiff,

vs.

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA, and AUTO CLUB INSURANCE ASSN., a Michigan corporation,
Defendant.

C. A. 82-226217-CK
HON. MICHAEL L. STACEY

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Attorneys for Defendant

SECOND AMENDED COMPLAINT AND DEMAND FOR TRIAL BY JURY

Comes now the Plaintiff herein, by and through his attorneys, LAW OFFICES JOHN W. MASON, P.C., and for his Second Amended Complaint against Defendant, states as follows:

Common Allegations

1. That Plaintiff is a resident of the County of Wayne, State of Michigan, and Defendant is a Michigan corporation with its principal place of business in the City of Dearborn, County of Wayne, State of Michigan, and the amount in controversy is in

excess of $10,000.00, exclusive of costs, interest and attorney's fees.

2. That at all times pertinent hereto, Plaintiff was an employee of Defendant, acting in the capacity of commission salesman.

3. That when Plaintiff entered the employ of Defendant he agreed to do so based upon the promise of a just-cause discharge policy, which included promises and inducements:

a) That he would have a lifetime job as long as he did not steal;

b) that he would work as a commission salesman for Defendant and enjoy the benefits of a seven (7%) percent commission for all sales and renewals.

c) that if he worked hard and built up his "book of business," which is the accumulated memberships and policies that a commission salesman builds up over the years, he would be able to earn large sums of money on his future new sales and renewals at the seven (7%) percent commission;

4. That Plaintiff provided "additional consideration" for these promises, in addition to the services to be performed, and this contract had distinguishing features in that Plaintiff as a state licensed insurance salesman, in exchange for promises of job security, forebore from:

A. Selling insurance for companies other than Defendant under the specific directive of Defendant and in consideration for Defendant's promises and statement that Plaintiff's position was a "well paid career position."

B. Working as an independent insurance agent where he could earn as much as a 20% commission rate and place the insurance he sold with any company he so chose.

5. That for many years, Plaintiff worked very hard and built up his "book of buisness" in reliance upon the promises of Defendant and in order to enable him to enjoy the benefits of a large income due to his individual efforts in developing his business; which in the process helped build the Defendant to its position as the largest insurer in the State of Michigan.

Count I — Breach of Contract

6. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

7. That notwithstanding the many promises of the Defendant in this action, Defendant breached said promises and changed certain policies (although it never changed its "just-cause" discharge policy) without advising Plaintiff when Plaintiff came into the employ of Defendant that Defendant was reserving the right to do so, which was in violation of its promises as follows:

a) Eliminating commissions as a basis for compensation for salespersons;

b) establishing a "unit compensation" program whereby the commission salesmen would only get a certain amount of money per membership or policy rather than a percentage commission as had been promised to the commission salesmen when they entered the employ of Defendant;

c) establishing unrealistic and improper new sales quotas for its commission salesmen which action was not a legitimate change of business policy to increase sales but a subterfuge and sham to eliminate commission salesmen in order to falsely establish "just-cause" for their termination;

d) coercing Plaintiff and other persons similarly situated out of their employment, and replacing them with non-licensed clerks;

e) taking affirmative steps to prevent the commission salesmen from performing their duties and achieving their goals.

8. That these actions by Defendant resulted in Plaintiff's employment with Defendant being actually and constructively terminated.

9. That upon Plaintiff entering the employ of Defendant, Plaintiff formed legitimate expectations based upon Defendant's policy statements that Defendant would honor its promises to Plaintiff and that Plaintiff would be able to earn a substantial living on the basis of hard work in building a large "book of business."

10. That the actions of Defendant constitute a breach of contract with Plaintiff, whereby Plaintiff has suffered damages.

Count II — Promissory Estoppel

11. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

12. That the Defendant made the promises alleged herein.

13. That the Defendant reasonably should have expected its promises to induce action of a definite and substantial character on the part of Plaintiff.

14. That Plaintiff did rely on said promises and forebore from pursuing other career goals in order to further the joint interests of Plaintiff and Defendant, which reliance and forebearance was action of a definite and substantial character.

15. That if injustice is to be avoided, Defendant's promises must be enforced.

Count III — Unjust Enrichment

16. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

17. That at all times pertinent hereto, Plaintiff has built up a valuable "book of business" through his efforts.

18. That when Defendant stripped Plaintiff of his "book of buisness" it caused damage to the Plaintiff and unjustly enriched the Defendant in that the Defendant was able to take over Plaintiff's "book of business" without paying compensation to Plaintiff that it had agreed to.

Count IV — Conversion

19. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

20. That at all times pertinent hereto the Plaintiff had a property right in his "book of business," which property right was taken from him by the wrongful acts of Defendant, which constitute conversion.

Count V — Age Discrimination

21. That Plaintiff incorporates by reference the previous allegations as though fully set forth herein.

22. That the Plaintiff is a member of the class of employees protected under the Elliott-Larsen Civil Rights Act, MCLA 37.2201 et seq: MSA 3.548(101) et seq.

23. That the Defendant in this action contrived a scheme to eliminate senior and older commission sales representatives from the staff through imposition of unrealistic production quotas, not taking into consideration the fact that the senior commission salesmen had to spend disproportionate amounts of their time in servicing existing accounts, rather than seeking out new business.

24. That the Plaintiff herein was subjected to disparate (discriminatory) treatment in that he was required to meet new-sales quotas while the younger member advisors did not have to meet any new-sales quotas.

25. That the Plaintiff herein was subjected to intentionally inflicted harassment, humiliation and mental distress in order to force the termination of his employment.

26. That the imposition of the minimum production quotas was not for the legitimate purpose of increasing the productivity of Defendant's salespersons, but a contrivance to create cause for termination in order to replace Defendant's commission salespersons with younger, lower paid salaried personnel, which was in fact done.

27. That the actions of the Defendant violated the rights of Plaintiff under the aforedescribed Elliott-Larsen Civil Rights Act, MCLA 37.2201 et seq; MSA 2.548 (101) et seq.

Damages
(Counts I through V)

28. That the actions of the Defendant herein have damaged Plaintiff and caused him to lose substantial compensation, past and future, including commissions, fringe benefits and general damages.

(Count V)

29. That the actions of Defendant, in wilful and bad faith violation of the age discrimination statute, have caused Plaintiff past and future damages including, but not limited to, mental anguish, outrage, humiliation, embarrassment, disappointment at the loss of a career; and, non-disabling pain and suffering, both mental and physical.

WHEREFORE, Plaintiff prays for judgment against Defendant for actual and exemplary damages, in an amount that is fair and just and in accordance with the proofs, but not less than Ten Thousand ($10,000.00) Dollars, plus costs, interest and attorney's fees.

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DEMAND FOR TRIAL BY JURY

PLEASE TAKE NOTICE that Plaintiff herein demands a trial by jury of the above entitled action.

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Supreme Court, U.S.
FILED
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No. 89-908

In The

Supreme Court of the United States

October Term, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA,
and
AUTO CLUB INSURANCE ASSOCIATION,
Petitioners,

v.

WILLIAM J. BULLOCK,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

WHEN A PURPORTED IMPASSE OCCURS IN THE NEGOTIATIONS FOR A FIRST COLLECTIVE BARGAINING AGREEMENT, MAY THE EMPLOYER UNILATERALLY VOID PRE-EXISTING INDIVIDUAL EMPLOYMENT CONTRACTS BY DEPRIVING A STATE COURT OF JURISDICTION TO ENFORCE SUCH INDIVIDUAL CONTRACTS ON THE PURPORTED GROUNDS THAT THE NATIONAL LABOR RELATIONS ACT, 29 USC § 151 *ET SEQ.*, PREEMPTS SUCH STATE COURT JURISDICTION?

The Petitioners Answer "Yes."

The Respondent Answers "No."

The Michigan trial court Answered "No."

The Michigan Court of Appeals Answered "No."

The Michigan Supreme Court Answered "No."

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF FACTS:

A. Background Facts 1

B. The Michigan Supreme Court's Decision In *Bullock* 4

REASONS FOR DENYING THE WRIT:

I. AN EMPLOYER'S RIGHT TO UNILATERALLY VOID ITS PRIOR CONTRACTUAL COMMITMENTS HAS BEEN REPUDIATED BY THE COURT. 6

A. The Court Has Carefully Reserved The Right Of Employees To Enforce Individual Contracts Prior To The Advent Of A Collective Bargaining Agreement. .. 6

B. The Court Has Carefully Reserved The Rights Of The States To Establish Minimum Conditions Of Employment. 10

II. THE RECORD IS NOT SUFFICIENTLY DEVELOPED FOR REVIEW. 12

III. THE ISSUE PRESENTED IS TOO NARROW TO JUSTIFY REVIEW. 13

IV. THE MICHIGAN SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEAL. 15

CONCLUSION 17

TABLE OF AUTHORITIES

PAGE

CASES:

Automobile Club of Michigan, 237 NLRB 379 (1978), *enforced*, 631 F.2d 82 (6th Cir. 1980) .. 2-3

Belknap, Inc. v *Hale*, 463 U.S. 491 (1983) ... 5, 8, 9

Bullock v *Automobile Club of Michigan*, 432 Mich 472, 444 NW2d 114 (1989) 4, 11, 15, 16

Derrico v *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) 16

Garner v *Teamsters*, 346 U.S. 485 (1953) 7

H. J. Heinz v *Labor Board*, 311 U.S. 514 (1941) ... 9

J. D. Alexander v *Standard Oil Co.*, 53 Ill App 3rd 690, 368 NW2d 1010 (5th Dist. 1977) 14

J. I. Case v *NLRB*, 321 U.S. 332 (1944) .. 5, 6, 7-8, 9, 14

Machinists v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) 5, 8

Maushund v *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986) 15

Metropolitan Life Insurance Co. v *Massachusetts*, 471 U.S. 724 (1985) 6, 10-11

NLRB v *Jones & Laughlin*, 301 U.S. 1 (1936) 9

NLRB v *Sands*, 306 U.S. 332 (1939) 9

National Licorice v *NLRB*, 309 U.S. 350 (1939) 6, 7, 9

National Metalcrafters, Division of Keystone Consolidated Industries v *McNeil*, 784 F.2d 817 (7th Cir. 1986) 15

Parker v *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989) 16

PAGE

Perry v *Sinderman*, 408 U.S. 593 (1972) 13

Roberts v *Automobile Club of Michigan*, 138 Mich App 488, 360 NW2d 224 (1984), *leave to appeal denied*, 424 Mich 867 (1986), *cert. denied*, 479 U.S. 889 (1986) 5-6, 9

San Diego Building Trades Council v *Garmon*, 359 U.S. 236 (1959) 5

Sears, Roebuck & Co. v *Carpenters*, 436 U.S. 180 (1978) 5

Serrano v *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) 16

Taggart v *Weinacker's Inc.*, 397 U.S. 223 (1970) 11

Toussaint v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW2d 880 (1980) 1

MISCELLANEOUS:

Elliott-Larsen Civil Rights Act, MSA 3.548(101); MCLA 37.2201 *et seq.* 11-12

Michigan Court Rules of 1985:
Rule 2.118 3
Rule 2.118(1) 3
Rule 2.118(4) 4

Michigan General Court Rules of 1963:
Rule 110.1 3
Rule 116.1(2) 13
Rule 118.1 3
Rule 118.4 4

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* . . . . . i, 2, 6, 15-16

No. 89-908

In The

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October Term, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA,
and
AUTO CLUB INSURANCE ASSOCIATION,
Petitioners,

v.

WILLIAM J. BULLOCK,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

COUNTER-STATEMENT OF FACTS

A. Background Facts

Respondent William J. Bullock was hired as an insurance sales agent by the Auto Club of Michigan in 1968. There was no union for the sales agents when he was hired. At the time of his hire he was made certain express oral promises regarding his employment. These oral promises are enforceable in contract under Michigan law, *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 292 NW2d 880 (1980).

Bullock was promised that he would never be fired unless he stole (just-cause), that he would be paid seven percent commission on all new and renewal insurance sales, and that he could earn a very substantial income

if he were to work hard and build up his "book of business." The "book" is the accumulated new and renewal insurance business from which an insurance agent derives his commission income (App 79a-80a).

Bullock worked very successfully as an insurance agent and developed a large book of business (App G, 75a).

In 1977, however, the Auto Club unilaterally announced to its sales agents that it was changing the method of compensation for new and renewal insurance sales. It announced a "unit compensation" system wherein a fixed amount would be paid for each coverage within a policy instead of the percentage commission originally promised (App G, 76a).

The new compensation plan was instituted on January 1, 1978 with the effects of the new compensation system not reaching respondent or his co-workers until July, 1978.

While the petitioners claim that the Auto Club implemented this new compensation formula after an impasse in bargaining (Pet 3), the Auto Club in fact changed the basis of respondent's compensation prior to any union certification and well prior to any bargaining.[1]

In particular, on February 7, 1978, following an election conducted pursuant to § 9 of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA), the NLRB certified the Michigan AAA Sales Association as the exclusive collective bargaining representative for AAA sales representatives in the Detroit area (App 21a). Bargaining, however, did not commence until 1980, when the Sixth Circuit ordered it. See *Automobile*

[1] This, in itself, illustrates how untimely and improvident is petitioners' petition. There is no official record of when unit compensation was implemented.

Club of Michigan, 237 NLRB 379 (1978), *enforced*, 631 F2d 82 (6th Cir. 1980).

In 1981, after the Auto Club and the union had bargained for some period of time, the Auto Club declared an impasse and imposed a set of "minimum production standards" on its sales representatives. These minimum production standards included a disciplinary procedure whereby sales representatives who failed to meet prescribed production standards would receive, in progressive sequence, an oral warning, a written warning, probation and ultimately discharge (App A, 21a).

Incident to discharge was the fact that the Auto Club would confiscate the books of business that the Branch Commission Sales Representatives had developed (App G, 77a). The ownership of this Auto Club book of business developed by respondent is a central issue in dispute in this litigation.

Bullock allegedly failed to meet the minimum production standards implemented subsequent to the final offer of the company and was discharged in February 1982.

Subsequent to his discharge, Bullock filed suit in Wayne Circuit Court, State of Michigan, alleging breach of contract *and* unjust enrichment (App G).

The Auto Club filed a motion for accelerated judgment as to the breach of contract claim only on NLRA preemption grounds. It ignored respondent's claim for unjust enrichment in its motion.

In addition, as the Auto Club's motions did not constitute responsive pleadings under the rules,[2] respondent

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[2] Under Michigan procedure, a plaintiff is permitted to amend his pleading within fourteen (14) days after being served with a responsive pleading by an adverse party. GCR 1963, 118.1; MCR 2.118(1). An answer (which may be combined with a cross claim or counter claim) is the only "responsive pleading to a complaint," which triggers the fourteen (14) day period. GCR 1963, 110.1; MCR 2.118.

was permitted to and did file a first amended complaint before a hearing on petitioners' motion. This first amended complaint alleged additional counts of conversion, age discrimination and negligent evaluation (App H). A second amended complaint was later filed adding a count of promissory estoppel and deleting the claim of negligent evaluation (App I).

Under Michigan procedure, the initial complaint's allegations were superseded by the subsequent amendments. GCR 1963, 118.4; MCR 2.118(4). However, petitioners did not amend their motion for accelerated/summary judgment (now summary disposition), preferring instead to pursue their attack on the now-superseded original complaint. This was later noted by the Michigan Supreme Court in its decision (App A, 19a).

In considering the Auto Club's motion for accelerated judgment, the state courts, as is proper under Michigan procedure, assumed that the well-pled allegations of the respondent's complaint were true. On the basis of those assumptions, the trial court denied the Auto Club's preemption claim but certified the question to the Michigan Court of Appeals. After granting application for leave to appeal from this interlocutory order, the Michigan Court of Appeals unanimously affirmed. The Auto Club next secured leave to appeal to the Michigan Supreme Court, which affirmed the Court of Appeals. *Bullock* v *Automobile Club of Michigan (AAA)*, 432 Mich 472 (1989).

B. The Michigan Supreme Court's Decision in *Bullock*

On the merits of Bullock's contract claim, the Michigan Supreme Court split three ways, with the majority supporting a remand for further developments of the factual record (App A). On the preemption issue, how-

ever, the Michigan Supreme Court unanimously joined Justice Levin's concurring opinion (App A, 7a-8a, 20a-28a, 39a).

Justice Levin denied the Auto Club's preemption claims under both the *Garmon* and *Machinists* doctrines. *San Diego Building Trades Council* v *Garmon*, 359 U.S. 236 (1959) and *Machinists* v *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).

On the *Garmon* claim, the Michigan Supreme Court, following this Court's decisions in *Sears, Roebuck & Co.* v *Carpenters*, 436 U.S. 180 (1978) and *Belknap, Inc.* v *Hale*, 463 U.S. 491 (1983), held that state jurisdiction was not preempted because ". . . the substance of Bullock's state law claims differ significantly from any claims he could have presented at the NLRB" (App A, 25a). In particular, as the Court held, the state law claims involve a determination of the "terms of Bullock's employment contract" and whether that contract had been breached, while the NLRB claim would focus on the "process of bargaining between the union and the Auto Club" (App A, 25a).

On the *Machinists* claim, the Michigan Court, following this Court's opinions in *J. I. Case* v *NLRB*, 321 U.S. 332 (1944) and *Belknap, Inc.* v *Hale*, *supra*, held that federal labor law had not granted an employer the power to unilaterally void pre-existing individual contracts in the absence of any collective agreement (App A, 27a-28a).

After the Michigan Supreme Court denied the Auto Club's motion for rehearing, the petitioners filed the instant petition for a writ of certiorari.[3]

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[3] This is actually petitioners' second petition for a writ of certiorari on the same facts. The first petition in *Automobile Club*

(concluded on page 6)

REASONS FOR DENYING THE WRIT

I.

AN EMPLOYER'S RIGHT TO UNILATERALLY VOID ITS PRIOR CONTRACTUAL COMMITMENTS HAS BEEN REPUDIATED BY THE COURT.

A. The Court Has Carefully Reserved The Right Of Employees To Enforce Individual Contracts Prior To The Advent Of A Collective Bargaining Agreement.

As the Court held, the purpose of the Wagner Act was to remedy "[t]he inequality of bargaining power between employees who do not possess . . . actual liberty of contract, and employers who are organized in corporate or other forms of organization." *Metropolitan Life Insurance Co.* v *Massachusetts*, 471 U.S. 724 (1985) [quoting 29 U.S.C. § 151].

Consistent with that purpose, the Court in the early years of the Wagner Act twice struck down employers' attempts to use individual contracts as a means to avoid reaching a collective agreement. *National Licorice* v *NLRB*, 309 U.S. 350 (1939); *J. I. Case* v *NLRB*, *supra*. In those cases, the Court carefully noted that an employer could not use collective bargaining as an excuse to unilaterally void whatever individual contract rights employees might have obtained. *Id.* Insofar as petitioners now argue that respondent had forfeited his

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(*continued from page 5*)

of Michigan, et al. v *Clifford Roberts, et al.*, S. Ct. No. 85-1731, was denied 479 U.S. 889 (1986). The Michigan Supreme Court's holding in *Bullock* is essentially an affirmance of the Michigan Court of Appeals' holding in *Roberts* v *Automobile Club of Michigan*, 138 Mich App 488, 360 NW2d 224 (1984), *leave to appeal denied*, 424 Mich 867 (1986). The Michigan Court of Appeals' decision in *Bullock* had by reference adopted the *Roberts* Court of Appeals decision.

right to enforce individual contracts by selecting a bargaining representative, that argument is foreclosed by these two seminal decisions of this Court.

In particular, in *National Licorice, supra,* the National Labor Relations Board had struck down the employer's attempt to use individual contracts as a shield against collective negotiations. As a remedy, the Board ordered all such contracts voided. While affirming the basic Board decision, the Court very carefully noted the continuing role of individual employment contracts in industries covered by the NLRA and modified the Board's order so as not to ". . . foreclose the employees from taking any action to secure an adjudication upon the [individual] contracts . . ." *National Licorice* v *NLRB, supra,* 309 U.S. at 365.

Four years later, in an opinion by Justice Jackson, the Court unanimously reaffirmed the continuing validity of individual employment contracts in the absence of a collective bargaining agreement. *J. I. Case* v *NLRB, supra.* As Justice Jackson was an early architect of the preemption doctrine,[4] the courts below quite properly paid special attention to his words:

> "Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act, *not merely as an act or evidence of hiring, but also in the sense of a completely individually bargained contract setting out terms of employment,* because there are circumstances in which it may legally be used, in fact, in which there is no alternative. Without limiting the possibilities, instances such as the following will occur: Men may continue to work

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[4] See *Garner* v *Teamsters,* 346 U.S. 485 (1953).

> after a collective bargaining agreement expires and, despite negotiations in good faith, *the negotiations may be deadlocked or delayed; in the interim express or implied individual agreements may be held to govern.*" *J. I. Case* v *NLRB, supra,* 321 U.S. at 336-337 (emphasis added).

Only six years ago, this Court relied extensively on Justice Jackson's opinion in *J. I. Case* to reaffirm the continuing vitality of individual employment contracts in industries covered by the NLRA and to reject the argument that the NLRA created some privilege to unilaterally void such contracts. *Belknap* v *Hale, supra,* 463 U.S. at 491, 500, 506-507, 511-512 (1983). In *Belknap,* as here, the employer sought to avoid state court jurisdiction by claiming that state breach of contract suits would "upset the delicate balance of forces established by federal law" and should therefore be preempted under *Machinists* v *Wisconsin Employment Relations Commission, supra.* In *Belknap,* as here, the employer claimed that it should be allowed to use its "economic weapons" free from any restraint imposed by its prior promises.

The *Belknap* Court found "mystifying" the employer's argument that state law should not "burden" the employer's "economic weapons" by enforcing the employer's otherwise valid promises. *Belknap* v *Hale, supra,* 463 U.S. at 500. While *Belknap* involved different plaintiffs and a different "economic weapon" (economic replacements), the employer here is advancing precisely the same argument and the result is equally mystifying. The employer seeks to convert an act designed to assure employees "actual liberty of contract" into a license for an employer to unilaterally breach its own voluntary, pre-existing contracts with employees.

Petitioners' attempt to justify this perverse result by implying that the employer's claimed right to unilaterally implement an offer contravening pre-existing individual contracts derives, somehow, from the Taft-Hartley Act (Pet 18-19). But this is not the case, for the employer's right to take unilateral action was recognized well before Taft-Hartley. See, e.g., *H. J. Heinz* v *Labor Board*, 311 U.S. 514, 525-526 (1941); *NLRB* v *Sands*, 306 U.S. 332 (1939); *NLRB* v *Jones & Laughlin*, 301 U.S. 1, 45 (1936). As the Michigan Court of Appeals held in a case very similar to the present case:

> "Although enforcement of an employment contract may have an incidental effect on the collective-bargaining process, the employer's right to implement its final offer emanates from its common-law, entrepreneurial right to run its business. However, the employer's common-law right of an employer to implement its final offer must be seen as limited by the employer's common-law duty to honor its contracts of employment. We believe that this is the appropriate accommodation of the parties' rights. A similar accommodation was found in *Belknap*, supra." *Roberts* v *Automobile Club of Michigan*, 138 Mich App 488, 500 (1984), *leave to appeal denied*, 424 Mich 867 (1986), *cert. denied*, 479 US 889 (1986).

The respondent here claims that years before the certification of a collective bargaining representative, the Auto Club voluntarily entered into contractual commitments with him. As this Court stated in *National Licorice*, *J. I. Case* and *Belknap*, the employer may not convert the NLRA into a means for unilaterally voiding those pre-existing contractual commitments. There is no need now for this Court to reconsider those very sound decisions.

B. The Court Has Carefully Reserved The Rights Of The States To Establish Minimum Conditions Of Employment.

As the Michigan Supreme Court unanimously held, the selection of a union representative did not instantly extinguish Bullock's state law claims or contract rights. Employees would hesitate to cast their lot with a union if they were deemed to have forgiven their common-law contract and other claims when a collective bargaining agent was certified without regard to whether a collective bargaining agreement is entered into (App A, 27a).

In recent years, this Court has held that the states have long been permitted, under the federal labor scheme, to enforce minimum labor standards. Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining process that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. *Metropolitan Life Insurance Co.* v *Massachusetts*, 471 U.S. 724, 755 (1985).

Although *Metropolitan Life Insurance Co.* v *Massachusetts, supra*, involves state legislation of mental health benefits, the rationale of the case is applicable here. There, the Court recognized that the end product of the collective bargaining process, the collective bargaining agreement, cannot be used to exclude unionized workers from certain minimum standards established by the State. As the Court stated:

> "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from

> state labor regulations imposing minimal standards on non-union employers." *Id.*, at 756.

Likewise, there is no reason to give the Auto Club of Michigan the right to unilaterally impose its last offer on the employees when that offer violated the employment contracts of both its Detroit area workers, covered by a union, and its non-unionized outstate workers. If this were done it would deprive the unionized employees of their right to sue, while allowing the non-Detroit area workers remedies in state court. If the Detroit area workers had ratified a contract, the situation would be different but that did not occur.

The Court in *Metropolitan* further stated:

> "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act. 'A holding that the States were precluded from acting would remove the backdrop of state law that provided the basis of congressional action . . . and would thereby artificially *create* a no-law area.'" *Metropolitan Life Insurance Co., supra*, 471 U.S. at 757, quoting *Taggert* v *Weinacker's Inc.*, 397 U.S. 223, 228 (1970) (concurring opinion) (emphasis in original).

The *Bullock* holding does no more than establish that an employee, as a prerequisite to certifying a collective bargaining agent, need not grant the employer the right to unilaterally void state contract rights.

Here, along with enforcing his contract right, Bullock is attempting to prevent the unjust enrichment of the Auto Club of Michigan, protect his property right in his book of business, and stop age discrimination under the Michigan Elliott-Larsen Civil Rights Act, MSA 3.548

(101); MCLA 27.2201 *et seq.* Clearly, the Auto Club should not be allowed to "turn the policy that animated the Wagner Act on its head" by claiming that certification of a union granted the eventual right to unilaterally deprive employees of state property rights and, implicitly, to practice age discrimination by engaging in collective bargaining and then unilaterally implementing an agreement violative of those rights.

II.

THE RECORD IS NOT SUFFICIENTLY DEVELOPED FOR REVIEW.

This Court should deny the Writ as the record below is largely undeveloped and ill-suited for review. Little discovery has been taken and there is no court testimony. In discussing the state law contract claim on its merits the Michigan Supreme Court noted several times that the record was ill-suited for appellate review (App 12a-14a).

Moreover, petitioners in their motion attacked only part of respondent's original complaint and failed to amend their motion to respond to the amended complaints filed by respondent.[5]

Respondent's initial complaint in this action alleged two counts — breach of contract and unjust enrichment. The Auto Club responded to this complaint with a motion for accelerated judgment as to the breach of

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[5] Petitioners note that virtually identical lawsuits have produced state court jury verdicts. The verdicts described have been for age discrimination as well as breach of contract in all but one instance. They also include verdicts in areas where no collective bargaining representative was certified. There is no record to support petitioners' allegations regarding the facts alleged in petitioners' footnote (Pet at 13).

contract claim *only*, under the then-existing Michigan General Court Rules of 1963, GCR 116.1(2).

With the petitioners' motion attacking only the contract count of respondent's original complaint, review at this point would result in an extremely truncated decision in this case. On this record, the petitioners have not attacked the property rights claim or age discrimination claim of respondent in his first and second amended complaints. But those two claims assert that the minimum production standards violate respondent's property rights in his "book" and his right to be free from age discrimination.

The interaction and interdependence of these claims in this litigation is so overwhelming that to isolate the contract claim without reference to any of the other claims would produce a skewed analysis of the facts. Moreover, whatever the Court's ruling on this petition, the respondent would proceed with what on this record are factually undeveloped claims relating to ownership of property (the book of business developed by respondent) and age discrimination (the creation of distinctly harsher work standards for respondent and his co-workers with a relaxed set of performance standards for younger, newly-hired workers who are also fully licensed sales agents of the Auto Club).

III.

THE ISSUE PRESENTED IS TOO NARROW TO JUSTIFY REVIEW.

Petitioners do not dispute that the enforcement of individual contracts for employment has long been with the states. *Perry* v *Sinderman*, 408 U.S. 593, 602 n. 7 (1972). Nor do petitioners contend that the mere advent of a union would disturb these contracts. Nor,

for his part, does respondent dispute that a collective bargaining contract would ordinarily supersede individual agreements. *J. I. Case* v *NLRB*, 321 U.S. 332 (1943). The dispute here is limited to one extremely narrow issue: the ability of the employer to void pre-existing individual employment contracts after a union has been certified and has bargained to impasse but before it has reached even a first collective bargaining agreement.

Petitioners suggest that with the decision below the "Michigan Court has effectively rewritten and nullified the Federal Scheme" (Pet at 12). Yet, other than litigation between the Auto Club and its discharged sales agents, petitioners are unable to cite a solitary case which involves the issue of post-certification, pre-first contract enforcement of individual contracts.

Respondent has found only one other lower court precedent related to the question here. See *J. D. Alexander* v *Standard Oil Co.*, 53 Ill App 3rd 690, 368 NW2d 1010 (5th Dist. 1977). As here, the court concluded that otherwise enforceable individual contracts do not become unenforceable merely because the employer has bargained to impasse with the union.

Alexander, however, did not address the precise issue presented here since it did not involve the pre-first contract negotiation and since it involved the relatively rare situation where the collective bargaining agreement incorporated individual "side agreements." Even so, *Alexander* illustrates respondent's position: the issue presented is very narrow, and the principles for resolving that issue are well-established in this Court's prior decisions.

This extremely narrow issue is constricted even more by respondent's claims of property rights in the "book

of business" developed by him which was confiscated by the Auto Club after imposition of the "minimum production standards" and discharge of respondent for failure to meet those standards. Respondent has in his original and amended complaints alleged counts of "conversion" and "unjust enrichment" in regard to this confiscation.

This confiscation, through assertion of exclusive property rights in the book of business by the Auto Club, was certainly done under principles of state property law. No argument has been made that there is any justification for this confiscation under principles of NLRA preemption, yet what the Auto Club has done under state law, it defends on the basis of federal labor law preemption.

IV.

THE MICHIGAN SUPREME COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEAL.

AAA attempts to characterize several post-1986 cases as being in conflict with the *Bullock* decision. These alleged conflicts do not actually exist.

National Metalcrafters, Division of Keystone Consolidated Industries v *McNeil*, 784 F.2d 817 (7th Cir. 1986) involved the application of an Illinois wage payment statute to require the employer to pay vacation benefits under terms of an *expired collective bargaining agreement*. This was held preempted by § 301 of the Taft-Hartley Act and § 8 of the NLRA.

Maushund v *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986) involved an employee working under an *existing collective bargaining agreement*. He sued for breach of an alleged oral contract with the employer.

The Sixth Circuit held there was total preemption where there was a collective bargaining agreement in existence covering this employee.

Derrico v *Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) was a situation where an employee working after the *expiration of a collective bargaining agreement* alleged this expired collective bargaining agreement supplied the terms of an implied contract under state law. His claim under state law was held preempted.

Serrano v *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986) involved employees working under an *existing collective bargaining agreement* who brought fraud claims for alleged misrepresentations by the employer regarding rebuilding coke plants. Preemption was based on a collective bargaining agreement provision that the employer had the right to decide whether to rebuild the coke plant.

Parker v *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989) involved former employees who had been working under an *existing collective bargaining agreement* who brought state law fraud claims alleging the company misrepresented that it would keep the steel plant open if employees granted concessions. Preemption was based on NLRA § 8's requirement of good faith bargaining.

The cases cited by petitioners are so factually distinguishable from the post-certification/pre-first contract issue decided in *Bullock* as to be irrelevant. They provide no justification for any claim of conflict between *Bullock* and these several federal courts of appeal decisions.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 89-908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN and AUTO CLUB INSURANCE ASSOCIATION,

Petitioners,

v.

WILLIAM J. BULLOCK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. This Court Should Grant The Petition To Reaffirm The Validity Of The Entire *Garmon* Doctrine	4
II. This Court Should Grant The Petition To Reaffirm That The States Cannot Restrict The Lawful Economic Weapons Of Employers And Unions	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: PAGE

American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965) 8

International Longshoremen's Ass'n v. *Davis*, 476 U.S. 380 (1986) 2, 4, 5, 6

Lingle v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988) 4, 7

Machinists v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) ..... *passim*

National Metalcrafters v. *McNeil*, 784 F.2d 817 (7th Cir. 1986) 8

Powell v. *National Football League*, 888 F.2d 559 (8th Cir. 1989) 8, 9

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) ..... *passim*

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 3

Wells v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed Dec. 27, 1989 ..... *passim*

STATUTES:

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) ..... *passim*

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 3

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BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONERS

General Motors Corporation ("GM") respectfully submits this brief as amicus curiae in support of the petitioners Automobile Club of Michigan and Auto Club Insurance Association (hereinafter referred to together as "AAA").[1]

[1] The written consents of the parties to the filing of this brief have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

GM's interest in this case arises from the fact that it is a large employer of unionized workers, many of whom are employed in the State of Michigan, and the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____, December 27, 1989. In *Wells*, the court of appeals held, *inter alia*, that this Court's decision in *International Longshoremen's Ass'n.* v. *Davis*, 476 U.S. 380 (1986), effectively abolished the "arguably prohibited" branch of the *Garmon* pre-emption doctrine. Under the Fifth Circuit's interpretation of *Davis*, a party's showing that its own conduct (as alleged by its opponent) arguably violated the National Labor Relations Act is not sufficient to require pre-emption because it is not a claim that could "reasonably be *upheld* by the Board." 881 F.2d at 171.

Petitioners in this case forcefully argue that respondent's state law claims seek to regulate conduct arguably protected or prohibited by the NLRA and are therefore pre-empted under *Garmon*. Obviously, if the "arguably prohibited" portion of petitioners' argument has any merit at all (and we believe it does), the Fifth Circuit in *Wells* incorrectly held that *Davis* precludes such an argument. Resolution of petitioners' *Garmon* claim thus might have a direct impact on *Wells*.

In addition, the petition presents the question of whether an employer's statutory right to unilaterally implement its final offer following a collective bargaining impasse is an economic weapon that the states cannot regulate. The Michigan Supreme Court's restrictive interpretation of the *Machinists* doctrine and of the economic weapons available to employers conflicts with the decisions of other courts and is of grave concern to GM as a Michigan employer.

GM is filing this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and also to emphasize the importance of the issues presented by the petition to employers in Michigan and elsewhere.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves two of the three labor law pre-emption doctrines that this Court has developed over the past 35 years to ensure the integrity of the collective bargaining process and of federal regulation of union-management relations.[2] The *Garmon* doctrine preserves the exclusive jurisdiction of the National Labor Relations Board over claims relating to conduct regulated by the National Labor Relations Act. And the *Machinists* doctrine precludes state regulation of the "economic weapons" of unions and employers.

The Michigan Supreme Court misapplied both of these pre-emption doctrines in this case. The court's decision would permit the very kind of state interference that *Garmon* and *Machinists* were intended to preclude. It would allow employees to bypass the National Labor Relations Board and to sue in state court over conduct that is regulated by the NLRA, and it would effectively allow the state to restrict or even prohibit important economic weapons that Congress intended employers to be free to use. This Court should grant the petition and should reverse the Michigan Supreme Court's decision.

---

[2] The third pre-emption doctrine requires that disputes relating to the terms of collective bargaining agreements be decided under the federal law of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455-457 (1957).

ARGUMENT

I. This Court Should Grant The Petition To Reaffirm The Validity Of The Entire *Garmon* Doctrine.

In *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959), the Court held that state regulation of conduct arguably within the realm of the Board is pre-empted by the Act:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * * * *
>
> When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

As the Court only recently emphasized in *Davis*, 476 U.S. at 389-390, even in ambiguous cases in which it is not "clear whether the particular activity regulated by the States [is] governed by §7 or §8 * * * 'courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the * * * Board.' " See also *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 n.8 (1988).

Petitioners contend that AAA's unilateral implementation of its final offer at the bargaining table was conduct arguably protected or prohibited under Section 8 of the Act. It would be prohibited if the prerequisites for unilateral change upon impasse did not exist at the time, and

it would be protected if they did. GM agrees with petitioners that in these circumstances, respondent's state law claims were pre-empted under *Garmon*.

Any resolution of this issue must begin with an acknowledgment that both branches of the *Garmon* doctrine remain intact, and that an employer remains free to argue that claims against it are pre-empted if they allege conduct that is arguably prohibited by Section 8. That might seem to be an uncontroversial acknowledgment. But in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. pending, No. 89-____ (Dec. 27, 1989), the Fifth Circuit misinterpreted the Court's decision in *Longshoremen* v. *Davis* to effectively abolish the "arguably prohibited" branch of *Garmon*.

In *Wells*, GM argued in support of its motion for summary judgment that the plaintiffs' claims of fraud and misrepresentation amounted to charges that GM circumvented and deceived the union and bargained directly with employees. If true, those allegations would show that GM failed to bargain in good faith and thus violated Section 8(a)(5), 29 U.S.C. § 158(a)(5). The Fifth Circuit acknowledged that at least some of the conduct alleged by the employees would violate Section 8(a)(5), but it held that under *Davis*, state regulation of conduct arguably prohibited by the NLRA is no longer pre-empted (881 F.2d at 171; emphasis in original):

> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claims could not reasonably be *upheld* by the Board.

The Fifth Circuit thus read *Davis* in a startling and unprecedented way: as eliminating the "arguably prohibited"

branch of *Garmon* by concluding that a party's assertion that its own conduct (as alleged by its opponent) arguably violated the Act is not sufficient to require pre-emption because it is not a claim that could "reasonably be *upheld* by the Board." *Ibid.*

As we explain in our petition in *Wells*, the Fifth Circuit's interpretation directly conflicts with the decisions of several other courts of appeals that have recently applied the "arguably prohibited" branch of the *Garmon* doctrine. Moreover, the Fifth Circuit's interpretation of *Davis* is plainly incorrect. Contrary to the broad reading given it by the Fifth Circuit, *Davis* merely defined the term "arguably." The Court held that to sustain its burden of showing that a claim involves conduct that is "arguably" prohibited or protected by the NLRA, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." 476 U.S. at 395. The party must show "that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.* In other words, *Davis* requires the party asserting *Garmon* pre-emption to do more than articulate a farfetched theory under which there would be a remote possibility that the Board would find its conduct prohibited or protected.

The erroneous construction of *Davis* adopted by the Fifth Circuit would have widespread and unfortunate consequences not even remotely contemplated by this Court. By abolishing the "arguably prohibited" branch of *Garmon*, it would open the door to wholesale state regulation of conduct that Congress intended to be regulated only through the NLRB. In fact, the Fifth Circuit's reformulation of *Garmon* would not be met even in cases where the conduct alleged was actually (rather than arguably)

prohibited by the Act. This Court's subsequent reiteration of the "arguably prohibited" branch in *Lingle*, 108 S. Ct. at 1883 n.8, makes clear that it does not interpret *Davis* as the Fifth Circuit did.

Although the Michigan Supreme Court in this case misapplied the *Garmon* doctrine, at least it acknowledged the continuing validity of the "arguably prohibited" branch. Pet. App. 22a-23a. However, the Michigan court's determination that so basic a federal labor law issue as the circumstances under which an employer can implement its final offer can be determined under state law is so damaging to the federal regulatory scheme that it cries out for review. We urge the Court to grant certionari to make it clear that claims similar to those of respondent are pre-empted under *Garmon*. By doing so, the Court would reemphasize that *Davis* did not abolish *sub silentio* the "arguably prohibited" branch of *Garmon* pre-emption.

II. This Court Should Grant The Petition To Reaffirm That The States Cannot Restrict The Lawful Economic Weapons Of Employers And Unions.

The second pre-emption doctrine involved in this case precludes state regulation of labor relations conduct that Congress intended to remain unregulated. *Machinists* v. *Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976). The *Machinists* doctrine leaves unions and employers free to use lawful economic weapons to bring about resolution of collective bargaining disputes. It recognizes that "[i]n selecting which forms of economic pressure should be prohibited * * * Congress struck the 'balance * * * between the uncontrolled power of management and labor to further their respective interests.' " 427 U.S. at 146 (quoting *Teamsters* v. *Morton*, 377 U.S. 252, 258-259 (1964)). " '[R]esort to economic weapons should

more peaceful measures not avail' is the right of the employer as well as the employee, *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. at 317, and the States may not prohibit the use of such weapons or 'add to an employer's federal legal obligations in collective bargaining' any more than in the case of employees." *Id.* at 147.

Petitioners contend that unilateral imposition of an employer's final bargaining offer upon impasse is an economic weapon immune from state interference under *Machinists*. The Michigan Supreme Court summarily rejected that argument on the inexplicable ground that respondent's "action is essentially an ordinary contract action, routinely heard in state court." Pet. App. 27a. That may be true, but it is completely irrelevant to the pre-emption issue. The critical question for pre-emption purposes is not whether the state law claim is a routine contract action, or a tort action, or an action under a state labor law. The relevant question is whether the state law claim would restrict or regulate economic weapons that Congress intended to be regulated only by "the free play of economic forces." *Machinists*, 427 U.S. at 146-147. If state law does regulate such a weapon, it is pre-empted, no matter how "routine" the state claim may be or what it is called.

The decision of the Michigan Supreme Court that AAA's unilateral imposition of its final offer upon impasse is *not* a protected economic weapon conflicts with decisions of at least two federal courts of appeals. In *National Metalcrafters* v. *McNeil*, 784 F.2d 817, 826-828 (1986), the Seventh Circuit held that an employer's unilateral imposition of a vacation payment formula after the parties had reached impasse was protected under the *Machinists* doctrine. And in *Powell* v. *National Football League*, 888 F.2d 559 (1989), the Eighth Circuit rejected a contention that the nonstatutory labor exemption to the antitrust

laws expired upon impasse. In reaching that conclusion, the court relied on the fact that federal law provides a "comprehensive array" of economic weapons that are available "even after impasse." 888 F.2d at 568. "After impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals. * * * [A] dispute such as the one before us 'ought to be resolved free of intervention by the courts' * * *." *Ibid.*

The Michigan Supreme Court's decision presents a serious obstacle to the unfettered resolution of collective bargaining disputes in the state. It would tip the economic balance by denying employers one of the most significant economic weapons in their arsenal. The right of employers to unilaterally impose a final offer upon impasse has long been recognized. This Court should grant the petition to resolve the conflict created by the Michigan Supreme Court's decision and to make it clear that state law cannot restrict this important employer weapon.

CONCLUSION

The petition for a writ of certionari should be granted.

Respectfully submitted.

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-v-

WILLIAM J. BULLOCK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
PRELIMINARY STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
I. Certiorari Should Be Granted To Address A State Court Decision That Contravenes Fundamental Precepts Of Federal Labor Policy	5
II. If Permitted To Stand, The Michigan Supreme Court's Decision Will Have A Serious And Far Reaching Impact On Unionized Industries	7
III. The Michigan Supreme Court Failed To Recognize That Federal Labor Law Governs A Collective Bargaining Relationship From Its Very Inception, Not Just From Its Consummation	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 5

Central Metallic Casket Co., 91 NLRB 572 (1950) 10

Chemical Producers Corp., 183 NLRB 141 (1970) 11

Derrico v. Sheehan Emergency Hospital, 844 F.2d 22 (2d Cir. 1988) 8

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 10, 11

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 5

Local No. 438 Const. and General Laborers Union v. Curry, 371 U.S. 542, 548 (1963) 11

Maushund v. Earl C. Smith, Inc., 795 F.2d 589 (6th Cir. 1986) 8

National Metalcrafters, Division of Keystone Consolidated Industries v. McNeil, 784 F.2d 817 (7th Cir. 1986) ... 8

Newspaper Printing Corp. v. NLRB, 625 F.2d 956 (10th Cir. 1980) 10

San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959) 10

Taft Broadcasting Co., 163 NLRB 475 (1967), enforced *sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) 11

Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980) 6

STATUTES:

Labor Management Relations Act § 301, 29 U.S.C. § 185.. 4

National Labor Relations Act, 29 U.S.C. § 151 et seq... passim

TABLE OF AUTHORITIES — (Continued)

MISCELLANEOUS:

52nd Annual Report of The National Labor Relations Board for Fiscal Year ended September 30, 1987 6

Daily Labor Report (BNA), Aug. 11, 1988 7

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U.S. Dept. of Labor; Bureau of Labor Statistics, "Major collective bargaining agreements scheduled to expire or with wage reopenings, by year and industry" as reprinted in *Collective Bargaining Negotiations and Contracts* (BNA 1989) ... 8

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INTEREST OF THE AMICI CURIAE

The National Association of Manufacturers ("NAM") is an association of approximately 13,500 companies and subsidiaries that together produce more than eighty percent of this nation's manufactured goods and employ eighty-five percent of all manufacturing workers in the United States, many of whom are potentially affected by the issues addressed herein. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Michigan Manufacturers Association ("MMA") is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its

members, and otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michigan Legislature, and State agencies. MMA appears before this Court as a representative of approximately 2,700 private employers who employ more than 1,000,000 employees, many of whom are represented by unions in collective bargaining units subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), all of whom are potentially affected by the issues presently before this Court. MMA is also an employer of workers in the State of Michigan and has an interest in this case both as an employer and as a representative of employers affected by the issues decided herein. NAM and MMA represent the interests of their member-employers through various means including, as here, appearances as *amicus curiae* in cases of major concern.

As two principal voices of the manufacturing industry in the United States and Michigan, NAM and MMA have a strong interest in ensuring that the uniform and predictable body of federal labor law, under which the industry functions, not be eroded or diminished by inconsistent state court decisions on the implementation of national labor policy. Where prosecution of unionized employees' state law claims will interfere with or frustrate federal labor policy, NAM and MMA believe such claims must yield to federal preemption. The geometric increase in the number of implied contract and breach of oral promise employment lawsuits over the past decade has already created a climate of uncertainty for American businesses. This case presents a most extreme example of the type of oral promise on which implied contract claims are founded — that an employee would have a job as long as he wasn't caught stealing. Where, as here, the oral promise sought to be enforced is not only capricious, but directly at odds with lawfully imposed terms and conditions governing discharge from employment, (a "last best" offer implemented by the employer following an impasse in

bargaining) the matter is of particular concern to NAM, MMA and their members.

The Michigan Supreme Court's decision below not only frustrates a lawful economic self-help remedy, but directly contravenes the federal labor scheme established by Congress. Applicable preemption doctrines require that self-help remedies of labor disputants remain free of state regulation and controlled only by the free play of economic forces. If the mandate of federal preemption is disregarded, American employers will be subjected to unpredictable and inappropriate jury awards that will threaten their ability to compete effectively in international markets, or, in some cases, merely to survive in American markets.

The scenario in this case is far from an isolated occurrence. This particular factual situation prompted scores of virtually identical lawsuits brought by AAA employees in Michigan's state courts. Similar situations are potentially, if not actually, reflected in thousands of cases throughout the nation (see discussion, infra, pp. 7-8). Accordingly, the National Association of Manufacturers and Michigan Manufacturers Association submit this brief *amicus curiae*, with the consent of all parties, in support of the petition for a writ of certiorari in order to assist the Court in evaluating the import of the issue presented by this dispute.

PRELIMINARY STATEMENT

The question in this case is whether the NLRA preempts an implied oral contract claim raised by a member of a collective bargaining unit under state law, when the claim concerns conduct that is arguably protected or prohibited by the NLRA and undermines an economic self-help remedy that Congress intended to be unregulated. The answer to this question will determine, in effect, whether the implied oral contract, alleged to have been made before the employee cast his lot with a collective bargaining unit, may override the terms and conditions of employment that were lawfully implemented by his employer following a *bona fide* impasse in collective bargaining between his employer and his exclusive bargaining representative.

The terms of employment as asserted by Bullock in his state law action (that he would be discharged only if caught stealing) directly contradict the discharge standard (based on production levels) implemented by AAA following an impasse in bargaining with the collective bargaining unit of which Bullock was a member. Such unilateral implementation of an employer's "last best offer" is clearly comprehended by § 8 of the NLRA (see pp. 9-11 infra). AAA moved in the trial court to dismiss Bullock's claims on NLRA preemption grounds. The trial court denied the motion, but certified the question for immediate appeal because it involved "controlling questions of law as to which there is substantial ground for difference of opinion" (Petition for Certiorari, Appendix E, 71a-72a). The Michigan Court of Appeals summarily rejected the company's NLRA preemption arguments on the stated ground that no collective bargaining agreement had ever been consummated between AAA and the union. Michigan's highest court, the Michigan Supreme Court, rejected the company's NLRA preemption arguments for essentially the same reason — the absence of a consummated contract.

The inquiry formulated by the Michigan courts was whether the terms and conditions of employment, lawfully imposed by AAA following an impasse in collective bargaining with Bullock's union, took precedence over Bullock's alleged individual oral promise of employment that predated his union's certification. The Michigan courts obviously confused NLRA preemption with § 301 preemption. Labor Management Relations Act, 29 U.S.C. § 185. Because no collective bargaining agreement was effected, the Michigan Supreme Court found no federal labor preemption. However, in deeming the consummation of a collective bargaining agreement the *sine qua non* for the application of federal labor law, the Michigan courts totally disregarded the validity of terms and conditions of employment lawfully imposed by AAA as an economic self-help remedy contemplated and protected by the NLRA.

Neither Michigan court focused on the significant fact that the parties to this dispute are parties to a collective bargaining relationship — a relationship that is governed from its inception,

not just its consummation, by the National Labor Relations Act. NAM and MMA submit that Bullock's claim and the similar claims of his 50 co-workers must be addressed under federal labor law and that if they choose to challenge AAA's actions, then they must do so in the forum that has been vested with exclusive jurisdiction over disputes that arise in the context of collective bargaining relationships: the National Labor Relations Board.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS A STATE COURT DECISION THAT CONTRAVENES FUNDAMENTAL PRECEPTS OF FEDERAL LABOR POLICY

Prior decisions of this Court have addressed the issue of whether implied contract claims are preempted by § 301 where their resolution requires interpretation of a collective bargaining agreement. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). In *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court touched upon the problems that arise when individual contracts conflict with the terms of a collectively bargained contract. The Court there held that an individual contract cannot take anything away from a collectively bargained agreement.[1]

The issue presently before this Court, however, is one of first impression, and as articulated further below, of enormous import. The Court's resolution of the federal preemption issue raised in this case is particularly warranted because of the large number of states that now recognize a claim for breach of an implied contract or of an oral promise of continued employment or specified employment conditions. Such claims are often based on oral promises that had been made in the past by supervisory personnel at any level of an organization, at any time in the

[1]The Michigan Courts turned this entire concept inside out by reasoning that unless a collective bargaining agreement is consummated, an individual contract takes precedence over the collective bargaining process.

individual employee's relationship with his employer. As a result of decisions such as that of the Michigan Supreme Court below, a large majority of these claims may be submitted to state court juries for resolution. This is precisely what Congress intended to prevent when it created a labor board vested with jurisdiction over disputes between employers and employees represented by a union in a collective bargaining unit.

> The purpose of the Nation's primary labor relations law is to serve the public interest by reducing interruptions in commerce caused by industrial strife. It seeks to do this by providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another. The overall job of the NLRB is to achieve this goal through administration, interpretation, and enforcement of the Act. 52 NLRB Ann. Rep. 3 (1987).

The fundamental policies underlying the federal labor scheme — uniformity and predictability — would be entirely frustrated if implied contract claims brought by union-represented employees are decided by the courts of 50 different states. Indeed, it should be noted that because the decision below was issued by the same court that first recognized a *Toussaint*[2] implied contract claim, it may be particularly influential on appellate courts in other states.

We submit that the time is right for the Court to address the merits of the NLRA preemption argument in this context. The Congressional mandate of uniform and effective enforcement of this nation's labor policy cannot be served by allowing a multitude of state courts to separately determine whether alleged oral or implied individual employment contracts remain effective, notwithstanding valid terms and conditions of employment arising out of the collective bargaining process. That responsibility lies with the National Labor Relations Board.

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[2] *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980)

II. IF PERMITTED TO STAND, THE MICHIGAN SUPREME COURT'S DECISION WILL HAVE A SERIOUS AND FAR REACHING IMPACT ON UNIONIZED INDUSTRIES

The impact of the decision below will extend to all employers who, following an impasse in bargaining, lawfully impose changes in terms and conditions of employment. There are at least two scenarios in which an employer would unilaterally implement a last, best offer. First, as in this case when, after union certification, negotiations toward an initial contract result in deadlock; and second, when bargaining parties are unable to reach a new agreement, even after a prior contract has expired.

Union members comprise 16.8% of the total American workforce and number over 17,002,000 (based on 1988 statistics, the last year for which official statistics have been released).[3] Between 1984 and 1988, unions organized close to 430,000 employees by winning nearly 9,000 certification elections.[4] Each new certification raises the possibility of impasse and the resulting dilemma faced by AAA in this case.

Employers whose contracts are set to expire will confront the same predicament. The Federal Mediation and Conciliation Service received 81,460 30-day contract expiration notices for fiscal year 1987, and 77,027 for fiscal year 1988.[5] During the past year alone, approximately 3.9 million workers in industry were covered by nearly 800 major collective bargaining agreements that were

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[3]U.S. Dept. of Labor, Bureau of Labor Statistics, "Employed wage and salary workers by age, sex, race, Hispanic origin, full or part-time status and union affiliation, 1987, 1988" as reported in *Daily Labor Report*, Jan. 30, 1989 at B-14.

[4]*Daily Labor Report*, Aug. 11, 1988 at B-1 and Selected U.S. Labor Statistics 1987 & 1988 as reported by BNA Plus, Dec. 22, 1989.

[5]Federal Mediation and Conciliation Services Contract Expiration Notices as reported by BNA Plus, Dec. 22, 1989. This did not include unreported expirations or collective bargaining agreements in the public sector or those covered by the Railway Labor Act.

scheduled to expire or be reopened in 1989.[6] In sum, the possibility of impasse followed by implementation of a last, best offer exists whenever contract negotiations are not immediately successful. Every other court that has ever addressed the preemption issue in this situation has held that federal labor law governs and displaces state law; see, for example, *National Metalcrafters, Division of Keystone Consolidated Industries v. McNeil*, 784 F.2d 817 (7th Cir. 1986). Moreover, anytime there is a hiatus between collective bargaining agreements, because an agreement has expired (see, for example, *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) — or because an employee has not yet come under the protection of an existing agreement — there is the possibility that state law claims like this one would be asserted, as was the case in *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986). Under the Michigan court's holding below, none of those situations would be preempted by federal labor law. This would severely chill an employer's right to exercise a federally protected and federally sanctioned economic weapon.

At least 36 states have already recognized an implied contract exception to the employment at will doctrine.[7, 8] Thus, the potential for conflict between unilaterally imposed terms and conditions and alleged individual implied contracts is staggering. If the decision below stands, state courts would be inundated with implied contract allegations that should properly be pursued as unfair labor practice claims and employers would be faced with directly conflicting regulatory systems under state and federal law.

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[6]A major collective bargaining agreement is defined as an agreement covering 1000 or more workers. U.S. Dept. of Labor, Bureau of Labor Statistics, "Major collective bargaining agreements scheduled to expire or with wage reopenings, by year and industry," as reprinted in *Collective Bargaining Negotiations and Contracts* at 8:313.

[7]Shepard, Heylman & Duston, *Without Just Cause* 8-9 (BNA 1989).

[8]Only six states have explicitly refused to do so (Delaware, Florida, Indiana, Missouri, North Carolina and Tennessee). Individual Employment Rights Manual at 505:51 (BNA 1989).

NAM and MMA urge the Court to consider the broad application of the significant issue raised by this case. The employer's right to unilaterally implement changes is a well established feature of federal labor law. Unilateral change after impasse not only provides a tactical weapon for the employer, but more importantly, assures the flexibility essential to a successful commercial enterprise and a healthy economy. If an employer is unable to implement a last, best offer without having to defend hundreds of individual implied contract claims, the employer's business may be seriously jeopardized to the detriment of both the employer and its employees.

III. THE MICHIGAN SUPREME COURT FAILED TO RECOGNIZE THAT FEDERAL LABOR LAW GOVERNS A COLLECTIVE BARGAINING RELATIONSHIP FROM ITS VERY INCEPTION, NOT JUST FROM ITS CONSUMMATION

The two-fold issue presented to this Court by AAA's petition for a writ of certiorari is whether the NLRA preempts an employee's state law employment contract claim that (1) directly contradicts terms and conditions of employment lawfully implemented by the employer following an impasse in collective bargaining and (2) undermines an economic self-help remedy which Congress intended to be unregulated and controlled only by the free play of economic forces. The significance of the issue is the impact that its resolution will have on employers caught between individual contract claims which seek to bind them to a panoply of old promises and representations — made years or decades earlier by supervisors and managers — and the obligation to deal responsibly with the employees' current democratically elected bargaining representative, their union. So long as employees are collectively represented by a union, their employer's paramount obligation to bargain with the union continues. Even the existence of an impasse does not terminate the duty to bargain. Although active negotiations may be suspended, "the employer may not take action disparaging to the collective bargaining process or

amounting to a withdrawal of recognition of the union's representative status." *Central Metallic Casket Co.*, 91 NLRB 572 (1950), see also *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 (10th Cir. 1980), as cited in *The Developing Labor Law*, Second Edition, Vol. I at 636. Just as an employer may not unilaterally implement terms and conditions for all employees that are better than those contained in its last offer, it may not implement better terms for individual employees — where doing so would disparage the collective bargaining process and undermine the status of the union as the exclusive statutory bargaining agent. Thus, if an employer were to accede to an alleged promise beneficial to an individual employee, the employer would implicitly violate the duty to bargain collectively imposed by § 8(a)(5) of the NLRA.

Surely the employee would rely upon the NLRA if his employer were to invoke a prior employment term amidst a labor dispute. Assume, for example, that Bullock was hired under a policy that he would be fired if he failed to come to work for three consecutive business days. If a union was later certified, bargained with AAA to impasse, and the union members went on strike for more than three days — prompting Bullock's discharge — clearly Bullock would seek a remedy under the NLRA.

The proscriptions and protections of the NLRA are equally available to the employer. Just as Bullock has the protected right to strike following an impasse in bargaining between his employer and his union, so does his employer have the protected right to unilaterally implement terms and conditions of employment previously proposed to the union. It is because the conduct complained of — the implementation of new terms and conditions is — protected by § 8 of the NLRA that his claim must be held preempted under *Garmon*[9] and its progeny. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986).

As this Court held in *Davis*, where a state law claim is preempted by the NLRA under *Garmon* and subsequent cases,

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[9]San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)

"the state courts lack the very power to adjudicate the claims that trigger preemption." 476 U.S. at 398. Where a claim contains allegations that make out an arguable violation of § 8, jurisdiction over the dispute lies "within the exclusive domain of the National Labor Relations Board." *Davis*, at 390 citing *Local No. 438 Const. and General Laborers Union v. Curry*, 371 U.S. 542, 548 (1963).

In *Davis*, this Court devised a practical test for determining whether the "precondition for pre-emption" has been met: "[A] party claiming pre-emption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." The party must also "put forth enough evidence to enable the court to find that the Board reasonably could uphold" its position. 476 U.S. at 394. As AAA explained in its Petition, Bullock's state law claims could have been presented to the NLRB as an unlawful unilateral change by AAA that was prohibited by § 8(a)(5) and § 8(d) of the NLRA and, in the event that AAA had acted improperly, he could have obtained relief. Petition for Certiorari pp. 14-21.[10] Alternatively, the NLRB could uphold AAA's unilateral change as a bargaining tactic comprehended and sanctioned by § 8(a)(5) and § 8(d). Either way it is conduct governed by the NLRA.

The parties need not have achieved an effective contract in order for Bullock or his co-workers to pursue a remedy, nor for the NLRB to address an employer's unilateral implementation of new terms and conditions following impasse. Contrary to the holding of the Michigan Supreme Court, the consummation of a collective bargaining agreement is not required for the parties' relationship to be controlled by federal labor law, a body of law that governs all aspects of the collective bargaining process, including impasse. In both *Chemical Producers Corp.*, 183 NLRB 141 (1970) and *Taft Broadcasting Co.*, 163 NLRB 475 (1967)

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[10]In 1987 the NLRB obtained $40,635,903 in reimbursement to employees illegally discharged and otherwise discriminated against. In that same year, the NLRB obtained 4,307 offers of job reinstatements with 3,206 acceptances. 52 NLRB Ann. Rep. 2 (1987).

enforced *sub nom American Federation of Television & Radio Artists v. NLRB*, 395 F.2d, 622 (D.C. Cir. 1968), a *bona fide* impasse was found when the parties reached a deadlock in their *initial negotiations*. The same rationale and policy that applied in these NLRB cases, and in those cited by Petitioner, applies to the continually arising scenarios portrayed above. Because this dispute reflects an important and recurrent issue of major significance to industry in this nation, the National Association of Manufacturers and Michigan Manufacturers Association urge the Court to resolve it at this time.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 89-908

In the Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA, and
AUTO CLUB INSURANCE ASSOCIATION,
PETITIONERS

v.

WILLIAM J. BULLOCK,
RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
A. This Case Is Procedurally Appropriate For Review By This Court Now	2
B. Bullock's Argument Would Turn The *J.I. Case* and *Belknap* Decisions On Their Heads	4
C. Bullock's Implied Oral Contract Claims Are Not State-Mandated Minimum Labor Standards	6
D. The Issue Presented Broadly Affects Employers In Michigan And Elsewhere	7
E. The Conflict Between The Decision Below And Several Federal Courts Of Appeals Is Readily Apparent	8
F. Conclusion	9

TABLE OF AUTHORITIES

Cases:	Page
Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985)	3
American Ship Building Co v. *NLRB*, 380 U.S. 300 (1965)	6
Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983)	2, 5
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987)	8
Construction Laborers v. *Curry*, 371 U.S. 542 (1963)	3
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	2
Golden State Transit Corp. v. *Los Angeles*, 475 U.S. 608 (1986)	6
H.K. Porter Co. v. *NLRB*, 397 U.S. 99 (1970)	6
J.I. Case v. *NLRB*, 321 U.S. 332 (1944)	4
Motor Coach Employees v. *Lockridge*, 403 U.S. 274 (1971)	3
National Licorice v. *NLRB*, 309 U.S. 350 (1940)	4
National Metalcrafters, Division of Keystone Consolidated Industries v. *McNeil*, 784 F.2d 817 (7th Cir. 1986)	8
Powell v. *National Football League*, 888 F.2d 559 (8th Cir. 1989)	6

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REPLY BRIEF OF PETITIONERS

Respondent Bullock's brief in opposition (at 11) acknowledges that he seeks to enforce state-law contract rights that *directly conflict* with AAA's federal-law right to unilaterally impose a last best offer following an impasse in bargaining. It is plainly Bullock, not his employer, who is "attempt[ing] to use individual contracts as a shield against collective negotiations" (brief at 7) — a use prohibited by this Court's decisions.

The points raised by Bullock in his brief in opposition confirm the necessity of this Court's review.

A. This Case Is Procedurally Appropriate For Review By This Court Now.

Bullock tries to obscure the importance of this case by suggesting that the record is inadequate and that other procedural idiosyncrasies of this case render the petition "untimely and improvident" (brief at 2 n.1). While this suggestion might well apply to the *state* contract law issues also addressed in the Michigan Supreme Court's opinion, it clearly does not apply to the *federal* labor law issues. *Only* with regard to the state-law contract issues did the Michigan court perceive inadequacies in the record requiring a remand *on those issues* (Pet. App. 11a-13a). Contrary to Bullock's assertion, the Michigan Supreme Court *unanimously* found the record adequate — *and factually undisputed* — for adjudicating the federal preemption issues.[1]

Nor is there any validity to Bullock's suggestion that some uniqueness of Michigan practice, combined with the amendment of Bullock's complaint, renders this case a procedural oddity or somehow makes it inappropriate for review by this Court (brief at 3-4, 12-13). There is no question that the Michigan Supreme Court's decision "finally" disposed of the NLRA preemption issue, which is central to all of Bullock's claims, and that to permit the litigation to go forward in state court without resolving the preemption issue "would involve a serious risk of eroding the federal statutory policy" of " 'requiring the subject matter of respondents' cause to be heard by the [National Labor Relations] Board, not by the state courts.' " *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983), quoting *Cox Broadcasting Corp.* v.

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[1] The only factual point concerning the federal preemption issue which Bullock contends is inadequately supported by the record is the timing of AAA's *initial* adoption of the "unit compensation" system in 1978 (brief at 2 & n.1). Even this is not so, however, because the facts in that regard are fully described in the Decision of the NLRB Administrative Law Judge, a copy of which has been lodged with the Clerk of the Court (Pet. 4-5 & n.2). It is also undisputed that the "unit compensation" system was part of the company's last best offer implemented following impasse in 1981 — the pertinent point for the NLRA preemption issue.

Cohn, 420 U.S. 469, 483 (1975); *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963).

Bullock's original one-count complaint (Pet. App. G) simply asserted a state-law contractual violation arising from AAA's unilateral implementation of "unit compensation" and minimum production standards.[2] AAA moved to dismiss Bullock's *entire original complaint* on the ground that it was preempted by the NLRA. While AAA's motion to dismiss was pending, Bullock filed a first amended complaint (Pet. App. H) which, for the first time, contained separate "counts" (Pet. App. 19a n.7). Bullock amended the complaint a second time, and it now has five separately labeled counts: breach of contract, promissory estoppel, unjust enrichment, conversion, and age discrimination (Pet. App. I).

As the Michigan courts recognized throughout the proceedings below, AAA's motion to dismiss on NLRA preemption grounds goes to the "central issue" underlying all of Bullock's claims: whether the unilateral implementation of terms of employment ("unit compensation" and minimum production standards) was federally protected and thus effective as to Bullock (Pet. App. 15a). A holding that the NLRA preempted state-law determination of this "central issue" would directly eliminate all of Bullock's counts or theories (however labeled) except age discrimination — and would even preempt that count to the extent it depended upon employment terms contrary to those implemented following impasse in bargaining.[3] As Bullock's brief

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[2] That Bullock's original complaint (Pet. App. G) used the quasi-contractual expression "unjustly enriched" in paragraph 12 (Pet. App. 78a) does not generate a separate non-contractual count. Nor is "unjust enrichment" a non-contractual concept.

[3] This Court has frequently admonished that a plaintiff's choice of state-law labeling is not the relevant point for federal preemption analysis. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971). "Any other result would elevate form over substance" and permit parties to evade the requirements of federal law. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985).

acknowledges (at 13), all of his state-law claims, *including his age discrimination claim*, turn on whether AAA's implementation of minimum production standards violated a state-law right.[4]

A ruling by this Court finding NLRA preemption would not produce "an extremely truncated decision" (brief at 13), but instead would affirm, as to the central (and likely dispositive) issue in this entire litigation, AAA's right unilaterally to implement new and binding terms of employment following an impasse in collective bargaining. The hypothetical possibility that a remnant of a state-law age discrimination claim would remain for Bullock does not detract from the importance and propriety of addressing the NLRA preemption issue now.

B. Bullock's Argument Would Turn The *J.I. Case* and *Belknap* Decisions On Their Heads.

The Michigan Supreme Court (Pet. App. 27a-28a) and Bullock (brief at 7-8) have rested their view of NLRA preemption on *J.I. Case* v. *NLRB*, 321 U.S. 332 (1944), and *National Licorice* v. *NLRB*, 309 U.S. 350 (1940). But those early cases simply held that employers could not use individual contracts to defeat the collective bargaining process prescribed by the Act. In *J.I. Case*, the Court addressed in *dictum* the hypothetical enforceability by employees of individual contracts. See 321 U.S. at 336-337. But the Michigan Supreme Court's and Bullock's expansive interpretation and application of that *dictum* would negate the Court's holding that individual contracts may not be used to

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[4] As Bullock notes (brief at 12 n.5), those lawsuits like his that have been tried in the Michigan courts have proceeded on *two* theories: breach of contract and age discrimination. The other three counts found in Bullock's second amended complaint (promissory estoppel, unjust enrichment, and conversion) have invariably been dismissed or withdrawn prior to trial or verdict. Thus, Bullock's emphasis (brief at 3, 13) on his conversion theory — based on an alleged "property right" in his "book" — is a red herring since no conversion claim has been, nor under Michigan law could be, recognized in this factual circumstance.

defeat the collective bargaining process.[5] In fact, Bullock is attempting to do here precisely what *J.I. Case* forbids: to use alleged individual contracts as a shield to defeat the collective bargaining process prescribed by the Act. The Act comprehends an employer's right to implement new and binding terms following an impasse in collective bargaining. As Bullock concedes, his claims would defeat that right and nullify one of the economic weapons left to bargaining parties under the Act. That is directly contrary to *J.I. Case's* holding and reasoning.

Nor does *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), support Bullock's argument. Pivotal to this Court's rejection of federal preemption in *Belknap* was the status of strike replacements as "innocent third parties" to the collective bargaining relationship who had no remedy under the NLRA. It was because the replacements were *outsiders to the federal scheme* that Justice White was mystified by the employer's suggestion that the NLRA shielded it from its state-law misrepresentation. *Id.* at 500.

Here, Bullock and his co-workers are not innocent third parties. *They invoked the federal scheme* by electing an exclusive bargaining representative and thereafter bargaining to impasse with their employer. Any complaints Bullock or his co-workers had regarding the collective bargaining process, or its product, could have been (and in some respects were) presented to the NLRB. To the extent there was merit to the charges (all charges were found to lack merit), the NLRB had statutory authority to fashion a remedy, including the re-establishment of the prior employment terms which Bullock and his co-workers now assert in their lawsuits (see Pet. 18-19).

While the impact of the state-law claims on the collective bargaining process was indirect and insignificant in *Belknap* because the plaintiffs were outside the federal scheme, it is most

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[5] The *J.I. Case* Court also assumed in its *dictum* that, in a contractual hiatus, an employer "may be under no legal obligation to bargain collectively" (see Pet. 25 n.14). Later decisions of this Court and the NLRB have made clear that the duty to bargain continues unabated during a contractual hiatus.

direct and significant here. The scores of state court lawsuits filed by Bullock and his co-workers *directly attack their employer's ability to exercise a federally sanctioned economic self-help weapon*, by asserting that prior conflicting individual oral contract terms cannot be superseded by the post-impasse implementation of a last best offer. By substituting *state* court juries as the regulators of their employer's *federal* right, Bullock and his co-workers would radically alter the balance of economic self-help weapons, and thereby directly and significantly alter the collective bargaining process. In the Michigan Supreme Court's and Bullock's view, the only way an employer could effectively implement new terms, regardless of the exigencies of the situation or the unreasonableness of the union's demands, would be with the union's agreement. That is contrary to the fundamental federal policy of free collective bargaining under which both parties can resort to economic strength to support their bargaining positions. *Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).[6]

C. Bullock's Implied Oral Contract Claims Are Not State-Mandated Minimum Labor Standards.

Bullock's brief (at 10-11) posits that Bullock's and his co-workers' implied oral contract claims are nothing more than state-mandated "minimum labor standards." To treat them otherwise, he contends, would make employees "hesitate to cast their lot with a union." Likewise, he continues, "there is no reason to give [AAA] the right to unilaterally impose its last offer" which would "violate[ ]" the employees' individual contracts and "deprive the unionized employees of their right to sue in state court."

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[6] Relying on the reasoning of the Michigan Court of Appeals, Bullock's brief (at 9) asserts that an employer's right to implement a final offer following an impasse in bargaining "emanates from its common-law, entrepreneurial right to run its business." The Michigan Court of Appeals' characterization disregards the fact that, since the passage of the Act, this right has been part of the fabric of the federal labor laws and an essential component of the balance of economic weaponry reserved to labor disputants. See *American Ship Building Co* v. *NLRB*, 380 U.S. 300, 316 (1965); *Powell* v. *National Football League*, 888 F.2d 559, 566-568 (8th Cir. 1989).

These assertions are antithetical to fundamental precepts of federal labor law. Bullock's and his co-workers' implied oral contract claims are actually the *opposite* of state-mandated minimum labor standards because, as Bullock argues, they can *only* be modified by a consummated collective bargaining agreement. The key characteristic of a minimum labor standard is that it *cannot* be modified by a collective bargaining agreement. In addition, under Bullock's theory, each individual employee — not the state — creates the standard. Moreover, employees *should* "hesitate" before they cast their lot with a union because they do trade one set of legal rights for another once they fall under the federal labor relations scheme. And an employer manifestly *does* have the right under federal law to unilaterally impose its last best offer following an impasse (see Pet. 18-19) — action which has no purpose other than to supersede pre-existing rights of employees.

Bullock's argument presupposes that he and his co-workers may accept the benefits of unionization and collective bargaining, but assume none of the risks. Among those risks are the loss of pay due to a strike or lockout, or permanent replacement during a strike, or, as here, unilaterally altered terms following an impasse in collective bargaining. The logic of Bullock's argument would apply equally to all of these actions by an employer; they would all be in derogation of alleged individual oral contract rights. Under Bullock's view (brief at 11), *the employee* determines whether to "grant the employer the right" to exercise its federally sanctioned economic weapons. That view — which the court below adopted — is both nonsensical and corrosive of federal labor policy.

D. The Issue Presented Broadly Affects Employers In Michigan And Elsewhere.

Bullock's brief (at 13-15) asserts that the "narrow" issue in this case could arise only where an employer and union reach impasse while bargaining for a *first* contract. That is not so. The issue can arise whenever there is a hiatus in contractual coverage, which can occur in both new and mature bargaining relationships. It can also arise as employees move in and out of bargaining unit

positions. See *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 397-398 & n.12 (1987) (noting that individual contract claims by unionized employees "might be pre-empted by the NLRA").

Michigan alone has thousands of employers that face the prospect of state court lawsuits by unionized employees who, under the Michigan Supreme Court's holding, could make state-law claims during a hiatus in contractual coverage. Needless to say, the same sort of claim could be made in other states as well.[7] This Court should grant AAA's petition to prevent widespread erosion of federal labor law and policy.

E. The Conflict Between The Decision Below And Several Federal Courts Of Appeals Is Readily Apparent.

Bullock's brief (at 15-16) strains to suggest that the conflict identified in AAA's petition (at 26-29) does not exist. This is so, Bullock contends, because the hiatus in the instant case occurred before a *first* labor contract, while in the federal decisions the hiatus came before a second or later contract. That distinction — on which Bullock's entire argument rests — is a distinction without a difference. The same economic self-help weapon is involved regardless of when it is exercised. The *Garmon* and *Machinist* preemption principles are precisely the same.

The Seventh Circuit's decision in *National Metalcrafters, Division of Keystone Consolidated Industries* v. *McNeil*, 784 F.2d 817 (7th Cir. 1986), involves the same issue on virtually identical facts: after an impasse in bargaining, the employer unilaterally implemented a new vacation pay formula (here it was a unit compensation system and minimum production standards), and the employees sought to enforce pre-existing terms under state law. The Seventh Circuit found the state-law claim preempted by the NLRA. The Michigan Supreme Court, however, wrongly

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[7] At least 35 other states have followed the lead of the Michigan Supreme Court in recognizing exceptions to the traditional employment-at-will doctrine (see Pet. 13 n.10).

dismissed the Seventh Circuit's decision as involving only §301 preemption (Pet. App. 21a-22a n.9). The conflict between the Michigan Supreme Court and several federal circuits is manifest, and deserves resolution by this Court.

F. Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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